

No. 624

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

HARRIET S. HOLTON, as Executrix
of Harriet Wood, Deceased,
Appellant,

vs.

ANDREW J. DAVIS, JR., THE
FIRST NATIONAL BANK OF
BUTTE, MONTANA, et al.,
Appellees.

TRANSCRIPT OF RECORD.

Vol. IV

(Pages 961 to 1264 Inclusive)

Appeal from the Circuit Court of the United States
for the District of Montana.

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It is now hereby ordered, adjudged, and decreed that the rights and the interests of the respective parties are as hereinbefore set forth:

It is further ordered, adjudged, and decreed that the prayers of said petitions be and the same are hereby granted, and that John H. Leyson, as administrator of the estate of Andrew J. Davis, deceased, be and he is hereby ordered and directed forthwith to distribute and deliver possession of all and singular the real estate belonging to the said estate of Andrew J. Davis, deceased, or in which the said estate may have any interest, situated in the State of Montana, to the following persons or their agents or legal representatives; and that such persons do have and hold their respective shares, parts, and portions thereof; and that such shares, parts and portions be and the same are hereby distributed to them, as owners or tenants in common, in the following proportion, to wit:

To the said Andrew J. Davis, Jr., and Charles H. Palmer, the said trustees, four hundred and thirty-one eleven-hundredths (431-1100) of said real estate; to be held and disposed of by them pursuant to the provision of said trust.

To the said Henry A. Root, Sarah M. Cummings, Mary L. Dunbar, Elizabeth S. Ladd, Charles H. Ladd, Ellen S. Cornue and Joshua G. Cornue two hundred and fifty eleven-hundredths (250-1100) of said real estate.

To the said John E. Davis as administrator of the estate of John A. Davis, deceased, two hundred eleven-hundredths (200-1100).

To the said Elizabeth S. Bowdoin, fifty eleven-hundredths (50-1100).

To the said Calvin P. Davis, fifty eleven-hundredths (50-1100).

To the said Harriet Wood fifty eleven-hundredths (50-1100).

To the said Elizabeth A. Smith twenty-five eleven-hundredths (25-1100).

To the said Harriet R. Sheffield and Henry A. Davis, forty-four eleven-hundredths (44-1100).

Dated at Butte City, Montana, February 8th, 1898.

JOHN LINDSAY,

Judge Second Judicial District Court, State of Montana,
Silver Bow county.

[Endorsed]: 285. In the Second Judicial District Court, Silver Bow County, Montana. In the Matter of the Estate of Andrew J. Davis, Deceased. Decree of Partial Distribution. Pro. Misc. F. 407. Filed Feb. 8, 1898. Clinton C. Clark, Clerk. By R. E. Leonard, Deputy Clerk.

Complainant's Exhibit, "Certificate of Clerk to Decree of Partial Distribution."

Office Clerk District Court.

State of Montana, }
County of Silver Bow. } ss.

I, Clinton C. Clark, clerk of the District Court of the Second Judicial Distret of the State of Montana, in and for the County of Silver Bow, hereby certify that the foregoing is a full, true and correct transcript of the following filed and records of my office, to wit: Will; certifi-

cate of facts found on probate thereof; order probating will and fixing shares, in the matter of the estate of Andrew J. Davis, deceased; petition of John E. Davis, administrator of the estate of John A. Davis, deceased, to settle interests of said estate in estate of Andrew J. Davis, deceased, and order on said petition, in the matter of the estate of John A. Davis, deceased; joint petition to fix shares and dismiss contests; order of court thereon; petition for partial distribution; petition of John E. Davis for partial distribution; answer of J. H. Leyson, administrator, to said petitions; decree of partial distribution; joint petition to distribute real estate; petition of Harriet R. Sheffield and Henry A. Davis for distribution of real estate; petition of John E. Davis as administrator, for distribution of real estate; answer of John H. Leyson, administrator, to said petition, and decree of partial distribution and order for delivery of real estate, in the matter of the estate of Andrew J. Davis, deceased, as the same appear of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, this 18th day of June, A. D. 1898.

[Seal]

CLINTON C. CLARK,
Clerk.

Complainant's Exhibit, "Exemplification of Record."

UNITED STATES OF AMERICA.

State of Montana, }
 County of Silver Bow. } ss.

I, John Lindsay, Judge of the District Court of the Second Judicial District of the State of Montana, in and for the county of Silver Bow, which is a court of record, having a seal, hereby certify that Clinton C. Clark, whose genuine original signature is subscribed to the annexed certificate and attestation, is and was at the time of making the said certificate and attestation, the clerk of said District Court of the Second Judicial District of the State of Montana, in and for the county of Silver Bow, duly elected, qualified, and acting as such clerk; that full faith and credit are due to his official acts, and that he is the legal keeper of all the records and seal of said court; that said certificate and attestation are in due form of law; and the seal affixed thereto is the genuine seal of said court.

Witness my hand at Butte City, Montana, this 18th day of June, A. D. 1898.

JOHN LINDSAY,

Judge of the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow.

State of Montana, }
County of Silver Bow. } ss.

I, Clinton C. Clark, clerk of the District Court of the Second Judicial District of the State of Montana, in and for the county of Silver Bow, which is a court of record, having a seal, do hereby certify that the Honorable John Lindsay, whose name is subscribed to the annexed and foregoing certificate, is and was, at the time of making such certificate, Judge of the District Court of the Second Judicial District of the State of Montana, in and for the county of Silver Bow, duly elected, sworn, qualified, and acting as such Judge, to all whose acts as such, full faith and credit are due, and that the signature of said Judge to said certificate is genuine.

Witness my hand and the seal of the District Court of the Second Judicial District of the State of Montana, in and for the county of Silver Bow, at my office in Butte City, Montana, this 18th day of June, A. D. 1898.

CLINTON C. CLARK,

Clerk of the District Court of the Second Judicial District
of the State of Montana, in and for the County of Silver Bow.

Complainant's Exhibit, "Wood, Power of Attorney."

(June 21, 1898. Charles W. Blair, Special Examiner.)

HARRIET WOOD	}	No. 58.
vs.		
A. J. DAVIS et al.		

Know all men by these presents, that I, Harriet Wood, of the city of Springfield, in the commonwealth of Massachusetts, have made, constituted, and appointed, and by these presents do make, constitute, and appoint Walter S. Logan, Charles M. Demond and Marx E. Harby, of the city of New York, composing the firm of Logan, Demond & Harby, doing business as attorneys and counselors at law at 58 William street, in the city of New York, or any or all of the said members of the said firm, my true and lawful attorneys for me and in my name, place and stead, to compromise, settle, and adjust upon such terms as they may think fit and proper, any and all suits, controversies and actions, whether in law or in equity in the courts of Montana or elsewhere, that I, as a party, have or may have with or against any and every person claiming any right or interest in or to the estate of Andrew J. Davis, deceased, late of the city of Butte, Montana, either as heir at law, legatee, or distributee under any will, or alleged will, of said Andrew J. Davis, deceased, or otherwise, and to receive any estate, real or personal, moneys or properties of any kind whatsoever, or distributive share thereof belonging to me, or of which I may become pos-

sessed by virtue of any such compromise, settlement, or adjustment; and upon receiving the same, to give proper receipts, vouchers, discharges, or releases therefor.

Also to sell and convey any and all real and personal estate or my interest therein of which said Andrew J. Davis died seised and possessed, or any part thereof, for such price or sum of money and to such person or persons as they or any of them shall think fit and proper, and also for me and in my name and as my act and deed, to sign, seal, execute, and deliver such deeds and conveyances for the sale and disposal thereof, or any part thereof, with such clauses, covenants and agreements to be therein contained as my said attorneys or any of them shall think fit and expedient, hereby giving and granting to my said attorneys and to every of them by these presents full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises as fully to all intents and purposes as I might or could do if personally present, with full power of substitution; I hereby ratifying and confirming all that my said attorneys or any of them shall lawfully do or cause to be done by virtue hereof.

In witness whereof, I have hereunto set my hand and seal this 16th day of June, in the year of our Lord one thousand eight hundred and ninety-seven.

HARRIET WOOD. [L. S.]

Signed, sealed and delivered in the presence of:

F. E. CARPENTER.

HARRIET S. HALTON.

City of Springfield,
 County of Hampden,
 Commonwealth of Massachusetts. } ss.

On this 16th day of June, in the year 1897, before me, Frank E. Carpenter, a notary public within and for the said county of Hampden, in the commonwealth of Massachusetts, duly authorized to take acknowledgments of deeds, personally appeared Harriet Wood, to me known and known to me to be the person whose name is subscribed to the within instrument, and she acknowledged to me that she executed the same.

In witness whereof, I have hereunto set my hand and my official seal this 16th day of June, in the year of our Lord one thousand eight hundred and ninety-seven.

FRANK E. CARPENTER,
 Notary Public, Hampden Co., Mass.

Commonwealth of Massachusetts, }
 Hampden. } ss.

I, Robert O. Morris, clerk of the Supreme Judicial Court, which is a court of record for the county and commonwealth aforesaid, do hereby certify that Frank E. Carpenter, Esquire, whose name is subscribed to the certificate of proof or acknowledgment of the annexed instrument, and therein written, was, at the time of the taking of such proof or acknowledgment, a notary public within and for said commonwealth of Massachusetts, duly authorized to take the same and the proof or acknowledgment of deeds; and that I am well acquainted with the handwriting of said notary, and verily believe

that the signature to the said certificate is genuine; and I certify that the said instrument is executed and acknowledged according to the laws of this State.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at Springfield, this 16th day of June, A. D. 1897.

[Seal]

ROBERT O. MORRIS,
Clerk.

Complainant's Exhibit, "Bowdoin, Power of Attorney."

(June 21, 1898. C. W. B. Spl. Examiner.)

HARRIET WOOD
vs.
A. J. DAVIS et al.) No. 58.

Know all men by these presents, that we, Elizabeth S. Bowdoin and John A. Bowdoin, her husband, both of the city of Springfield, in the commonwealth of Massachusetts, have made, constituted and appointed, and by these presents do make, constitute, and appoint Walter S. Logan, Charles M. Demond, and Marx E. Harby, of the city of New York, composing the firm of Logan, Demond & Harby, doing business as attorneys and counselors at law at 58 William street, in the city of New York, or any or all of said members of the said firm, our true and lawful attorneys for us and each of us and in our names, place, and stead, and in the name, place, and stead of each of us, to compromise, settle, and adjust, upon such terms as to them or any of them may seem fit and proper, any and all suits, controversies, and actions, whether in law or in

equity, in the courts of Montana or elsewhere, that we, as parties, or either of us as a party, have or may have with or against any and every person claiming any right or interest in or to the estate of Andrew J. Davis, deceased, late of the city of Butte, Montana, either as heir at law or heirs at law, legatee or legatees, or distributee or distributees, under any will or alleged will of said Andrew J. Davis, deceased, or otherwise, and to receive any estate, real or personal, moneys or properties, of any kind whatsoever, or distributive share thereof, belonging to us or to either of us, or of which we or either of us may become possessed by virtue of any such compromise, settlement or adjustment; and upon receiving the same to give proper receipts, vouchers, discharges or releases therefor.

Also to sell and convey any and all real and personal estate or our interest or the interest of either one of us therein, of which said Andrew J. Davis died seised and possessed, or any part thereof, for such price or sum of money and to such person or persons as they or any of them shall think fit and proper, and also for us and in our names, and also for either of us and in the name of either of us, and as our act and deed and as the act and deed of either of us to sign, seal, execute, and deliver such deeds and conveyances for the sale and disposal thereof or any part thereof, with such clauses, covenants, agreements, and conditions to be therein contained as our said attorneys or any of them shall think fit and expedient, hereby giving and granting to our said attorneys and to every of them by these presents full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and

about the premises as fully to all intents and purposes as we or either of us might or could do if personally present with full power of substitution; and we and each of us hereby ratify and confirm all that our said attorneys and or any of them shall lawfully do or cause to be done by virtue hereof.

In witness whereof, we have hereunto set our hands and seals this 16th day of June, in the year of our Lord one thousand eight hundred and ninety-seven.

ELIZABETH S. BOWDOIN. [Seal]

JOHN A. BOWDOIN. [Seal]

Signed, sealed and delivered in the presence of:

LIZZIE A. BOWDOIN,

F. E. CARPENTER,

Witness as to Elizabeth S. Bowdoin.

LIZZIE A. BOWDOIN,

F. E. CARPENTER,

Witness as to John A. Bowdoin.

“And or any of them” inserted in the twentieth line before the last two words on this page.

City of Springfield,
County of Hampden,
Commonwealth of Massachusetts, } ss.

On this 16th day of June, in the year 1897, before me Frank E. Carpenter, a notary public within and for the said county of Hampden, in the commonwealth of Massachusetts, duly authorized to take acknowledgments of deeds, personally appeared Elizabeth S. Bowdoin and John A. Bowdoin, her husband, both of whom are known to me to be the persons whose names are subscribed to

the within instrument and they jointly and severally acknowledged to me that they executed the same.

In witness whereof, I have hereunto set my hand and my official seal this 16th day of June, in the year of our Lord one thousand eight hundred and ninety-seven.

[Seal]

FRANK E. CARPENTER,
Notary Public, Hampden Co., Mass.

Commonwealth of Massachusetts, }
Hampden. } ss.

I, Robert O. Morris, clerk of the Supreme Judicial Court, which is a court of record for the county and commonwealth aforesaid, do hereby certify that Frank E. Carpenter, Esquire, whose name is subscribed to the certificate of proof or acknowledgment of the annexed instrument, and therein written, was, at the time of the taking of such proof or acknowledgment, a notary public within and for said commonwealth of Massachusetts, duly authorized to take the same and the proof or acknowledgment of deeds; and that I am well acquainted with the handwriting of said notary, and verily believe that the signature to the said certificate is genuine; and I certify that the said instrument is executed and acknowledged according to the laws of this State.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at Springfield, this 16th day of June, A. D. 1897.

[Seal]

ROBERT O. MORRIS,
Clerk.

Complainant's Exhibit, "Calvin P. Davis, Power of Attorney."

(June 21, 1898. C. W. B., Special Examiner.)

HARRIET WOOD }
vs. } No. 58.
A. J. DAVIS et al. }

Know all men by these presents, that I, Calvin P. Davis, of Peachland, in the county of Sonoma, and State of California, have made, constituted and appointed, and by these presents do make, constitute and appoint Charles M. Demond, of the city, county and State of New York, my true and lawful attorney for me and in my name, place, and stead and for my use and benefit, to ask, demand, sue for, recover, collect, and receive all such sums of money, debts, dues, accounts, legacies, bequests, interests, dividends, annuities, lands, tenements and hereditaments and demands whatsoever as are now or shall hereafter become due, owing, payable or belonging to me from the estate of Andrew J. Davis, deceased, late of Butte, Montana, or from the estate of John A. Davis, deceased, late of Butte, Montana, or from the heirs, next of kin, legatees or devisees of said decedents, or either of them, or from any other person interested in said estates, and to have, use and take all lawful ways and means in my name or otherwise for the recovery thereof by suits, attachments or otherwise, and to compromise and agree for the same, and give deeds, acquittances or other sufficient discharges for the

same; and for me and in my name to receive and receipt for my distributive share of said estates, or either of them, and to commence and prosecute in my name any suits, actions or proceedings in the matter of said estates or in relation to any interests or property therein, and to settle, compromise and withdraw the same, or any suits, actions, or contests now pending therein, upon such terms and conditions as he shall think fit; and for me and in my name to make, sign, seal and deliver all deeds, contracts, stipulations, and agreements and other instruments which my said attorney shall deem proper, in relation to the said estates or my interests therein, or any interests therein which may be obtained for me by such compromise or otherwise; and to bargain, sell, convey, take, or receive, or purchase, mortgage, or pledge any lands, tenements, or hereditaments, or any interests therein which I now have or may acquire by reason of my interest in said estates, or by reason of any settlement my attorney may make of my interests therein, on such terms and conditions as he may deem necessary or proper to effect any settlement in relation to my said suits or interests, and generally to do and perform all and every act or thing whatsoever which my said attorney shall deem necessary or proper in relation to any interest I may have or obtain in said estates, or the collection of the same, or the litigation connected therewith.

Giving and granting unto my said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully to all intents and purposes as I might do if personally present, with full power

of substitution or revocation of such substitution, hereby ratifying and confirming all that my said attorney or his substitute or substitutes shall lawfully do or cause to be done by virtue of these presents.

In witness whereof, I have hereunto set my hand and seal this 8th day of June, A. D. 1897.

CALVIN P. DAVIS. [Seal]

Witness:

GEO. P. BAXTER.

J. A. WILLIAMS.

State of California, }
County of Sonoma. } ss.

On this 8th day of June, in the year eighteen hundred and ninety-seven, before me, Geo. P. Baxter, a notary public within and for said county of Sonoma, personally appeared Calvin P. Davis, known to me to be the person whose name is subscribed to the within and foregoing instrument, and acknowledged to be that he executed the same.

In witness whereof, I have hereunto set my hand and affixed my notarial seal the day and year in this certificate first written.

[Seal]

GEO. P. BAXTER,

Notary Public in and for Sonoma County, State of California.

State of California }
County of Sonoma. } ss.

I, Somers B. Fulton, county clerk of the county of Sonoma, State of California, and ex-officio clerk of the Su-

perior Court, in and for said county (which court is a court of record, having a seal), do hereby certify that Geo. P. Baxter, whose name is subscribed to the certificate or proof of acknowledgment of the annexed instrument and therein written, was, at the time of taking such proof or acknowledgment, a notary public in and for said county, duly commissioned and qualified and duly authorized by law to take the same, and full faith and credit are due to all his official acts as such notary. And I do further certify that I am well acquainted with the handwriting of the said notary and verily believe that the signature to said certificate or proof of acknowledgment is genuine, and that the said instrument is executed and acknowledged according to the laws of this State.

In witness whereof, I have hereunto set my hand and affixed the seal of the said Superior Court at my office in the city of Santa Rosa, this eighth day of June, A. D. 1897.

[Seal]

SOMERS B. FULTON,

County Clerk and ex-officio Clerk of the Superior Court
of the County of Sonoma, State of California.

By F. G. Nagle,
Deputy Clerk.

No. 1. Peachland, California, June 8th, 1897.

Know all men by these presents, that I, Henry C. Davis, of Peachland, Sonoma county, California, son of Calvin P. Davis, do hereby join in the annexed power of attorney signed by my father, Calvin P. Davis, and do confer upon the said Charles M. Demond therein mentioned all the power and authority therein mentioned with respect to any interest I now possess, or may hereafter possess or ac-

quire, in and to the property therein mentioned, the said power of attorney so signed by my said father and to which I have referred is dated June 8th, 1897.

In witness whereof, I have hereunto set my hand and seal, the day and year first above written.

HENRY C. DAVIS. [Seal]

Witness:

J. A. WILLIAMS.

GEO. P. BAXTER.

No. 2. Peachland, California, June 8th, 1897.

Know all men by these presents, that we, Ina A. Cochran, daughter of Calvin P. Davis, and residing in Peachland, Sonoma Co., California, and Arthur F. Cochran, her husband, residing as aforesaid, do hereby join in the annexed power of attorney signed by Calvin P. Davis, and do confer upon the said Charles M. Demond therein mentioned all the power and authority therein mentioned with respect to any interest we now possess or may hereafter possess or acquire in and to the property therein mentioned. The said power of attorney so signed by said Calvin P. Davis, and to which we have referred, is dated June 8th, 1897.

In witness whereof, we have hereunto set our hands and seals the day and year first above written.

INA A. COCHRAN. [L. S.]

A. F. COCHRAN. [L. S.]

Witness:

J. A. WILLIAMS.

GEO. P. BAXTER.

State of California, }
 County of Sonoma. } ss.

On this 8th day of June, in the year eighteen hundred and ninety-seven, before me, Geo. P. Baxter, a notary public within and for said county of Sonoma, personally appeared Henry C. Davis and Ina A. Cochran and Arthur F. Cochran, her husband, severally known to me to be the persons whose names are subscribed to the within and foregoing instruments numbered 1 and 2 respectively and severally acknowledged to me that they executed the same.

In witness whereof, I have hereunto set my hand and affixed my notarial seal the day and year in this certificate first written.

[Seal]

GEO. P. BAXTER,

Notary Public in and for Sonoma County, State of California.

State of California, }
 County of Sonoma. } ss.

I, Somers B. Fulton, county clerk of the county of Sonoma, State of California, and ex-officio clerk of the Superior Court in and for said county (which court is a court of record, having a seal), do hereby certify, that Geo. P. Baxter, whose name is subscribed to the certificate or proof of acknowledgment of the annexed instrument and therein written was, at the time of taking such proof or acknowledgment, a notary public in and for said county, duly commissioned and qualified and duly authorized by law to take the same, and full faith and credit

are due to all his official acts as such notary. And I do further certify that I am well acquainted with the handwriting of the said notary and verily believe that the signature to said certificate or proof of acknowledgment is genuine, and that the said instrument is executed and acknowledged according to the laws of this State.

In witness whereof, I have hereunto set my hand and affixed the seal of the said Superior Court at my office in the city of Santa Rosa, this eighth day of June, A. D. 1897.

[Seal]

SOMERS B. FULTON,

County Clerk and ex-officio Clerk of the Superior Court
of the County of Sonoma, State of California.

By F. G. Nagle,

Deputy Clerk.

Complainant's Exhibit, "Contract of Settlement."

This indenture, made this twenty-second day of June, A. D. 1897, by and between Andrew J. Davis, of Butte, Montana, Edward A. Davis, of Chicago, Illinois, by Andrew J. Davis, his attorney in fact, so constituted by instrument dated the twenty-eighth day of April, 1893, John E. Davis, of Butte, Montana, Charles G. Davis, of Chicago, Illinois, George W. Davis, bachelor, and Morris A. Davis, bachelor, both of _____, sons and heirs of the said John A. Davis, deceased, and Thea. Jane Davis, of _____, widow of John A. Davis, deceased, parties of the first part, and Helen M. Davis, wife of Andrew J. Davis, Tenie B. Davis, wife of John E. Davis, both of Butte, Montana, and Gertrude F. Davis, wife of Charles G. Davis, and Mary A. Davis, wife of Edward A.

Davis, both of Chicago, Illinois, parties of the second part; and Henry A. Root, of Butte, Montana, Ellen S. Cornue, of Croton Falls, New York, Sarah Maria Cummings, of Ware, Massachusetts, Elizabeth S. Ladd, of Springfield, Massachusetts; Mary Louise Dunbar of Springfield, Massachusetts; all heirs at law of Andrew J. Davis, deceased, parties of the third part; and Rosine E. Root, wife of Henry A. Root, and Joshua G. Cornue, husband of Ellen S. Cornue, and Charles H. Ladd, husband of Elizabeth S. Ladd, parties of the fourth part; and John E. Davis, as administrator of the estate of John A. Davis, deceased, party of the fifth part; and Elizabeth S. Bowdoin, and John A. Bowdoin, her husband, of Springfield, Massachusetts, by Charles M. Demond, of the firm of Logan, Demond & Harby, her attorney in fact, so constituted by instrument dated the sixteenth day of June, 1897, and Harriet Wood, of Springfield, Massachusetts, by Charles M. Demond, of the firm of Logan, Demond & Harby, her attorney in fact, so constituted by instrument dated June sixteenth, 1897, and Calvin P. Davis, of Peachland, Sonoma County, California, by Charles M. Demond, his attorney in fact, so constituted by instrument dated June 8, 1897, parties of the sixth part, witnesseth:

I. Whereas, Andrew J. Davis, of the city of Butte, Montana, died at the city of Butte, where he resided, on March 11, 1890, leaving a large estate, real, personal, and mixed, situated in the State of Montana and elsewhere; and,

II. The said Andrew J. Davis left him surviving as his only heirs at law and next of kin the following per-

sons, entitled, in case of his intestacy, to the following shares of the said estate, and being of the following relationship to him, viz:

- (a) The said Diana Davis, a sister, one-eleventh;
- (b) The said Sarah M. Cummings, a sister, one-eleventh;
- (c) The said Harriet Wood, a sister, one-eleventh;
- (d) The said Elizabeth S. Bowdoin, a sister, one-eleventh;
- (e) The said Calvin P. Davis, a brother, one-eleventh;
- (f) The said John A. Davis, a brother, now deceased, one-eleventh;
- (g) Erwin Davis, of New York City, a brother, one-eleventh;
- (h) The said Henry A. Root and Ellen S. Cornue, children of Anna C. Root, deceased, a sister, one twenty-second each;
- (i) Elizabeth A. Smith, of Temescal, Contra Costa county, California, and the said Mary Louise Dunbar, children of Roxanna Dunbar, deceased, a sister, one twenty-second each.
- (j) Harriet R. Sheffield, of Northport, New York, and Henry A. Davis, of Monson, Massachusetts, children of Asa L. Davis, deceased, a brother, one twenty-second each;
- (k) The said Elizabeth S. Ladd, child of Sophronia Firman, deceased, a sister, one-eleventh; and,

III. Whereas, a paper purporting to be the last will and testament of Andrew J. Davis, deceased, dated July 20, 1866, was propounded for probate by the said John A. Davis in July, 1890, in the District Court of the Sec-

ond Judicial District of the State of Montana, in and for the County of Silver Bow, which said will gave, devised and bequeathed to the said John A. Davis all of the property of Andrew J. Davis, deceased, except a life maintenance therein given to Thomas Jefferson Davis, Pet Davis and Miss Bergett; and,

IV. Whereas, the probate of said will was contested in said court by the said Henry A. Root and Sarah Maria Cummings jointly, and also by the said Harriet R. Sheffield and Henry A. Davis, jointly; and,

V. Whereas, pending said contests, and on or about January 24, 1893, the said John A. Davis died intestate, leaving him surviving the parties of the first part, his sons and widow, as his only heirs at law and next of kin, and on March 11, 1893, the said John E. Davis was, by said court, duly appointed his administrator, and on or about April 1, 1893, the said John E. Davis, as such administrator, was substituted as proponent of said will in the place of his said father, John A. Davis, by order of said Court; and said probate proceedings, so begun by the said John A. Davis, were, by order of said Court, revived; and,

VI. Whereas, on or about March 27, 1895, the said contests, so instituted as aforesaid, against the probate of the said will, were compromised in said court, and the said will was, by order of said Court on said day, admitted to probate, and by certain contracts, stipulations, conveyances and agreements, made pursuant to the said compromise, among others, dated the 28th day of April, 1893, and the 25th day of March, 1895, it was agreed and contracted that the following persons should have and

be entitled to the following shares of said estate of Andrew J. Davis, deceased, in kind: Forty-four eleven-hundredths (44-1100) to the said Harriet R. Sheffield and Henry A. Davis; that is to say, twenty-two eleven-hundredths (22-1100) thereof to each of them (and subject to the bequests in said will to Thomas Jefferson Davis, Pet Davis and Miss Bergett); four hundred and fifty-six eleven-hundredths (456-1100) thereof to the said parties of the first part; and six hundred eleven-hundredths (600-1100) thereof to the parties of the third and fourth parts, with the exception of Rosine B. Root, wife of Henry A. Root; and, pursuant to the said contracts, stipulations, agreements and conveyances, a decree of the said Court was, on said March 27, 1895, entered according; and,

VII. Whereas, the parties of the first, third and fifth parts have acquired and purchased all the interests of the said Diana Davis in and to the said estate of the said Andrew J. Davis, deceased, as heirs at law or next of kin of the said Andrew J. Davis, deceased, or otherwise, and are now the owners thereof; and the parties of the first, third and fifth parts have acquired and purchased all the interests of the said Harriet R. Sheffield and Henry A. Davis in and to the said estate of the said Andrew J. Davis, deceased, as heirs at law or next of kin, or otherwise, over and above the said forty-four eleven-hundredths (44-1100) of the said estate, so transferred and conveyed to them as aforesaid, and are now vested therewith and the owners thereof; and,

VIII. Whereas, the said Elizabeth S. Bowdoin and Calvin P. Davis, after the probate of said will, did duly, within the time prescribed by law, institute in said

court separate contests, by petition, to revoke the probate of the said will, which contests are now at issue and are now pending, and the said Harriet Wood is interested with them in the said prosecution thereof, and is represented by the same attorney; and,

IX. Whereas, it is proposed and contemplated by the parties hereto to settle, adjust and compromise said contests of the said Elizabeth S. Bowdoin and Calvin P. Davis, and the claims and rights of the said Harriet Wood, and to fix and adjust the status and shares of the parties hereto in and to the said estate of Andrew J. Davis, deceased;

Now, therefore, in consideration of the premises, and of the sum of one dollar, paid by each party hereto to the other, and in consideration of other valuable considerations, the receipt of all of which by each party from the other is hereby acknowledged, and in consideration of the compromise and settlement of the said contests of the said Elizabeth S. Bowdoin and Calvin P. Davis, and of the rights and claims of the said Harriet Wood, and the dismissal of the said contests, it is hereby covenanted, agreed, stipulated and granted, as follows:

First. The parties of the first, second, third and fourth parts, and each of them, do hereby sell, assign, set over and transfer, and do hereby grant, bargain, sell, convey and confirm unto the said Elizabeth S. Bowdoin and the said Calvin P. Davis and the said Harriet Wood, their respective heirs, executors, administrators and assigns, forever, one undivided twenty-second (1-22) interest or part, in kind, to each of them respectively, in and to all of the property and estate of the said Andrew J. Davis,

deceased, real, personal and mixed, wherever situated, with which said parties are now vested or to which they are in any way entitled, or with which they or either of them may hereafter be vested or entitled, as heirs, next of kin, legatees or devisees of the said Andrew J. Davis, deceased, or by virtue of any contract in relation to the said estate; except such real estate as is situated in the State of Iowa and which the parties of the first and third parts, or their representatives, have heretofore agreed to convey to the said Thomas Jefferson Davis, which said real estate in Iowa is excepted from the terms of this indenture; and in and to the said estate of Andrew J. Davis, deceased, as it now exists, and in and to any property thereof which the said estate may hereafter acquire, the said estate and property, however, to be subject to the payment of maintenance given in said will to Pet Davis and Miss Bergett, and to the payment of all debts against said estate, and costs and charges of administration in Montana and elsewhere.

And with respect to all lands hereby transferred and conveyed, the said parties do hereby also grant, bargain, sell and convey, excepting as hereinbefore set forth, all and singular, the one undivided twenty-second (1-22) interest or part to each of the said Elizabeth S. Bowdoin, Harriet Wood and Calvin P. Davis, in and to all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and all veins, leads or lodes therein or thereto belonging, together with all the dips, spurs and angles, and also all the metals, ores, gold

and silver-bearing quartz, rock and earth, and all other metals and minerals therein, and all the rights, privileges and franchises thereto incident, attendant and appurtenant, or therewith usually had and enjoyed.

To have and to hold, all and singular, the said premises, together with the appurtenances and privileges thereto incident, unto the said Elizabeth S. Bowdoin, the said Harriet Wood and the said Calvin P. Davis, and each of them, their respective heirs and assigns, forever, one undivided twenty-second (1-22) part of all of the same to each of them respectively, the said parties hereby transferring and granting in all (subject and excepting as aforesaid), three undivided twenty-seconds (3-22) of all the property hereinbefore set forth and specified, to each of the said Elizabeth S. Bowdoin, Harriet Wood and Calvin P. Davis, one undivided twenty-second (1-22) thereof, which undivided twenty-second part thereof is hereby transferred and granted to each severally, and which they respectively hold with the other parties as tenants in common, and not as joint tenants.

Second. The parties of the first, second, third, fourth and fifth parts, their respective heirs, executors, administrators and assigns, do hereby covenant and agree to and with the parties of the sixth part, their respective heirs, executors, administrators and assigns, that in case Elizabeth A. Smith, whose contest against the probate of the will of Andrew J. Davis, deceased, is now pending, shall in said contest or by any settlement or adjustment of the same, or otherwise, receive or be entitled to any portion of the said estate, that then and in that event no portion so coming to the said Elizabeth A. Smith shall be taken

from the shares herein transferred and granted to the said Elizabeth S. Bowdoin, Calvin P. Davis and Harriet Wood, but that said shares shall be free and clear of all liability to pay or contribute to the payment of the same, or any part thereof; and do further covenant and agree that they will adjust and settle all claims of Thomas Jefferson Davis to all share in said estate, and that the shares herein granted and transferred to Elizabeth S. Bowdoin, Calvin P. Davis, and Harriet Wood shall be free and clear of all liability to pay or contribute to the payment, in whole or in part, of any claim or claims of the said Thomas Jefferson Davis, and do further agree that said shares so granted and transferred by this indenture to the said Elizabeth S. Bowdoin and Harriet Wood and Calvin P. Davis shall be free and clear of and from all costs, expenses, charges, counsel and attorney fee's of any parties of the first, second, third, fourth and fifth parts hereto, or any of them, expended, paid out, incurred or contracted in probating or opposing the probate of said will, or in any other matter or proceeding relating to said estate or the property thereof, or in respect to any litigation connected therewith, except expenses and costs of administration of the estate of Andrew J. Davis, deceased, and of litigation by the administrator of said estate, as such.

Third. It is mutually understood, covenanted and agreed by and between all the parties hereto, their respective heirs, executors, administrators and assigns, that the share or interest so as above transferred and granted to each of the said Elizabeth S. Bowdoin, Calvin P. Davis and Harriet Wood, in and by this indenture, is a one un-

divided twenty-second (1-22) part or interest, in kind, to each of them, not only in and to all property of said estate of Andrew J. Davis, deceased, real, personal and mixed, and in and to all property, choses in action and other rights and interests now owned by said estate, real, personal and mixed, and wherever situated (subject and excepting as aforesaid), but also in and to all claims, suits, choses in action and rights of said estate, in law or equity, for the recovery of property of said estate, or otherwise (subject and excepting as aforesaid), which now exist or which hereafter may exist or accrue, and of which the said Andrew J. Davis, deceased, died seised or possessed, or in which he had any interest at the time of his death, or to which his estate since his death had, or has, or may acquire any right or interest and which may hereafter come into the ownership of the said estate by operation of law or otherwise; it being the intention of this indenture that this indenture and conveyance shall be binding and operative upon all interests and property which the said parties of the first, second, third, fourth and fifth parts (subject and excepting as aforesaid), now have as heirs at law or next of kin of the said Andrew J. Davis, deceased, in and to his estate, or under or by virtue of the provisions of any will of said Andrew J. Davis, deceased, which is now or may hereafter be admitted to probate, or which they or either of them have acquired or may acquire in any manner whatsoever, by assignment or transfer from any person claiming to be an heir of Andrew J. Davis, deceased, or otherwise, and whether such interest shall descend to them, or either of them, directly from Andrew J. Davis, deceased, or his

estate, or by virtue of his will or otherwise, or whether such interests shall descend to or be acquired by or distributed to them directly from John A. Davis, deceased, or his estate, or otherwise; and that it is further understood, covenanted and agreed by the parties of the first part herein, that in case any distribution of any of the property of the estate of Andrew J. Davis, deceased, shall be had through or in the estate of John A. Davis, deceased, to all or any of the parties hereto, that then and in that event the shares or interests herein conveyed, granted and transferred to the said Elizabeth S. Bowdoin, Calvin P. Davis and Harriet Wood shall be free and clear of all claims of creditors of said John A. Davis, deceased, now filed in the matter of his said estate of which may hereafter be urged, prosecuted or filed, and free and clear from all costs of administration, attorney and counsel fees and all other charges and expenses in or against the said estate of John A. Davis, deceased; provided however, that in case Erwin Davis shall succeed in establishing any claim to and in recovering any part of the property of said estate in Massachusetts, so that the same shall not be obtained by or distributed to the parties of the first, third and fifth parts herein, by reason of the said claims of Erwin Davis, then said portion so obtained by the said Erwin Davis in Massachusetts shall not be considered as a part of the estate of Andrew J. Davis, deceased, conveyed or agreed to be conveyed by or under the terms of this indenture.

Fourth. In consideration of the premises, the said parties of the sixth part, to wit: Elizabeth S. Bowdoin and John A. Bowdoin, her husband; Calvin P. Davis and

Harriet Wood, for themselves, their heirs, executors, administrators and assigns, do hereby sell, assign, convey, transfer and grant, unto the said parties of the first and third parts, their heirs and assigns, forever, all the right, title, interest, claim and demand whatsoever, whether at law or in equity, and whether vested or contingent, of the said Elizabeth S. Bowdoin, Calvin P. Davis and Harriet Wood, and all and each of them, of, in and to all and every portion of the said estate of Andrew J. Davis, deceased, and all property thereof, whether real, personal or mixed, and wherever situated, except three undivided twenty-seconds (3-22) interests or parts or shares thereof, in kind, transferred and conveyed to said Elizabeth S. Bowdoin, Harriet Wood and Calvin P. Davis by this instrument, as hereinbefore provided, and the said Elizabeth S. Bowdoin and the said Calvin P. Davis do hereby withdraw, and do hereby agree to withdraw and dismiss, in open court or otherwise, their said contests so filed against the probate of said will as aforesaid, each party to pay his own costs, and all moneys deposited as security for costs to be returned to said Elizabeth S. Bowdoin and Calvin P. Davis, or their attorneys.

Fifth. It is mutually understood, covenanted and agreed that all parties hereto shall, so far as in their power lies, aid in securing speedily both a partial and final distribution of the said estate or estates, according to the terms of this agreement, and without the giving of any bond, if practicable, and agree to endeavor to obtain an order of the Court accordingly; and it is further agreed that no party to this instrument shall oppose such distribution, partial or final, and that all parties hereto shall

assist, as far as in their power lies, in securing the property of said estate in Massachusetts to be forwarded by the administrators of the said estate in Massachusetts to the administrator of said estate in Silver Bow County, Montana to be then in said county distributed as speedily as possible.

Sixth. It is further mutually agreed that the decree or decrees to be entered and filed in said court, withdrawing said contests, shall fix and set forth the shares of the said estate as herein transferred and granted, to the said Elizabeth S. Bowdoin, Harriet Wood and Calvin P. Davis, and shall be based upon all the terms and conditions of this indenture; and it is further mutually agreed that the law firm of Logan, Demond & Harby, of New York, and C. P. Drennen, attorney at law in Butte, Montana, shall control and direct the distribution of the said shares so transferred and granted to the said Elizabeth S. Bowdoin, Calvin P. Davis and Harriet Wood, and that if said attorneys so elect, all sums of money and personal property to be distributed, on account of said shares, in accordance with the terms of this indenture, shall be distributed to said attorneys, or their heirs or assigns, or as they may direct.

Seventh. This indenture shall not affect the right of the said estate of Andrew J. Davis, deceased, or any party hereto, of instituting or conducting suits or litigations, either before or after distribution, to recover for said estate any property to which said estate, at the time of the death of the said Andrew J. Davis, or since then, or now, was, has been, is, or shall hereafter be entitled, which right is reserved and saved to any or all of the parties

hereto, if any now exists or may hereafter accrue; *provided*, however, and it is understood and agreed by and, between all the parties hereto, that nothing in this agreement contained, either by reason of the execution hereof by the said Andrew J. Davis, one of the parties of the first part herein, for himself or as attorney in fact for any other party hereto, or otherwise, shall be construed or held or taken in anywise to affect of change or enlarge or diminish or impair the respective rights or claims of the said estate of Andrew J. Davis, deceased, on the one part, or of the said Andrew J. Davis, one of the parties of the first part herein, on the other part, of, in or to certain shares of the capital stock of the First National Bank of Butte, Montana, claimed by the said Andrew J. Davis, one of the parties of the first part herein, under and by virtue of a gift thereof to him, as his individual property, by the said Andrew J. Davis, deceased, or in any litigation that may now be pending or may hereafter be instituted, relating in any way to the said shares of said stock, and no grant or conveyance herein, made on the part of or by the said Andrew J. Davis, one of the parties of the first part herein, to any of the parties to this agreement, shall be held or construed to give or grant to anyone any right or interest, or to waive any right the said Andrew J. Davis, one of the parties of the first part herein, has or claims, in or to said shares of said stock, or any of them, claimed by him as his individual property under the gift above mentioned, nor shall any of the covenants or provisions of this agreement on his part apply to or affect said shares of stock, unless said shares should finally be adjudged to be the property of the said estate of Andrew J. Davis, deceased.

Eighth. It is further understood and hereby stipulated as part of the consideration of this agreement that none of the parties hereto shall take or institute any action or proceeding to charge the administrator with the will annexed of the said estate of Andrew J. Davis, deceased, for or on account of any default of the said administrator, if any there be, heretofore made or occurring, for any failure of said administrator to invest or derive interest from any of the funds of said estate, and no claim shall be made against such administrator by any of the parties hereto, for or on account of any such failure or default heretofore.

In witness whereof, the several parties to this indenture and agreement have hereunto set their hands, the day and year first hereinabove written.

ANDREW J. DAVIS,
EDWARD A. DAVIS,

By Andrew J. Davis,

His Attorney in Fact.

JOHN E. DAVIS.

JOHN E. DAVIS.

As Administrator of the Estate of John A. Davis, Deceased.

HELEN M. DAVIS.

TENIE B. DAVIS.

CHARLES G. DAVIS.

GERTRUDE F. DAVIS.

MORRIS A. DAVIS.

MARY A. DAVIS.

THEAH JANE DAVIS.

GEORGE W. DAVIS.

HENRY A. ROOT.

ROSINE B. ROOT.

ELLEN S. CORNUE.

JOSHUA G. CORNUE.

MARY LOUISE DUNBAR.

ELIZABETH S. LADD.

CHARLES H. LADD.

SARAH M. CUMMINGS.

ELIZABETH S. BOWDOIN,

By Charles M. Demond,

Her Attorney in Fact.

JOHN A. BOWDOIN,

By Charles M. Demond,

His Attorney in Fact.

HARRIET WOOD,

By Charles M. Demond,

Her Attorney in Fact.

CALVIN P. DAVIS,

By Charles M. Demond,

His Attorney in Fact.

Know all men by these presents, that we, Henry C. Davis, of Peachland, Sonoma county, California, son of Calvin P. Davis, Ina A. Cochran, of said Peachland in said county and State, daughter of the said Calvin P. Davis, and Arthur F. Cochran, her husband, by Charles M. Demond, their attorney in fact, so constituted by instrument dated the 8th day of June, 1897, do hereby ratify and approve the annexed indenture, dated the 22d day of June, 1897, to which the said Calvin P. Davis is a party, and do approve and confirm the same, and all the provi-

sions thereof, to the same extent as though we were original parties thereto.

In witness whereof, we have hereunto set our hands and seals by your said attorney this 25th day of June, 1897.

HENRY C. DAVIS.

INA A. COCHRAN.

ARTHUR F. COCHRAN,

All by Charles M. Demond,

Their Attorney in Fact.

Signed, sealed and delivered in presence of:

JOHN F. FORBIS.

State of Montana, }
County of Silver Bow. } ss.

On this 25th day of June, in the year 1897, before me, L. Orvis Evans, a notary public in and for Silver Bow county, State of Montana, personally appeared Charles M. Demond, known to me to be the person whose name is subscribed to the within instrument as the attorney in fact of Henry C. Davis, Ina A. Cochran and Arthur C. Cochran, and acknowledged to me that he subscribed the names of Henry C. Davis, Ina A. Cochran and Arthur C. Cochran thereto as principals and his own name as attorney in fact.

In testimony whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Notarial Seal]

L. ORVIS EVANS,

Notary Public in and for Silver Bow County, Montana.

State of Montana, }
 County of Madison. } ss.

On this 28th day of June, 1897, before me, Augustus Anderson, a notary public in and for the county of Madison, State of Montana, personally appeared Andrew J. Davis and Helen M. Davis, his wife, John E. Davis and Tenie B. Davis, his wife, all personally known to me to be the individuals described in and whose names are subscribed to the foregoing agreement, and who severally acknowledged to me, each for himself, and herself, that they executed the same.

In testimony whereof, I have hereunto set my hand and seal the day and year in this certificate first above written.

[Notarial Seal] AUGUSTUS ANDERSON,
 Notary Public in and for the County of Silver Bow, Mont-
 tana.

State of Montana, }
 County of Silver Bow. } ss.

On this 25th day of June, 1897, before me, L. Orvis Evans, a notary public in and for the county of Silver Bow, State of Montana, personally appeared Henry A. Root and Rosine B. Root, his wife, personally known to me to be the individuals described in and whose names are subscribed to the foregoing agreements, and who severally acknowledged to me, each for himself and herself, that they executed the same.

In testimony whereof, I have hereunto set my hand and seal the day and year in this certificate first above written.

[Notarial Seal] L. ORVIS EVANS,
Notary Public in and for the County of Silver Bow, Montana.

State of Montana, }
County of Madison. } ss.

On this 28th day of June, 1897, before me, Augustus Anderson, a notary public in and for the county of Madison, State of Montana, personally appeared Andrew J. Davis, known to me to be the person whose name is subscribed to the within instrument as attorney in fact of Edward A. Davis, and acknowledged to me that he subscribed the name of Edward A. Davis thereto as principal and his own name as attorney in fact.

In testimony whereof, I have hereunto set my hand and seal the day and year in this certificate first above written.

[Notarial Seal] AUGUSTUS ANDERSON,
Notary Public in and for the County of Madison, State of Montana.

State of Illinois, }
County of Cook. } ss.

On this 13th day of July, 1897, before me, Nellie M. Lewis Panushka, a notary public in and for the county of Cook, State of Illinois, personally appeared Charles G. Davis and Gertrude F. Davis, his wife, both personally known to me to be the individuals described in and whose

names are subscribed to the foregoing agreements, and who severally acknowledged to me, each for himself and herself, that they executed the same.

In testimony whereof, I have hereunto set my hand and seal the day and year in this certificate first above written.

[Notarial Seal] NELLIE M. LEWIS PANUSHKA,
Notary Public in and for the County of Cook, State of Illinois.

State of Washington, }
County of Spokane. } ss.

On this 13th day of August, 1897, before me, Guss W. Roche, a notary public in and for the county of Spokane, State of Washington, personally appeared Thea Jane Davis, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that she executed the same.

In testimony whereof, I have hereunto set my hand and seal the day and year in this certificate first above written.

[Notarial Seal] GUSS W. ROCHE,
Notary Public in and for the County of Spokane, State of Washington, Residing at Spokane.

State of Illinois, }
County of Cook. } ss.

On this 16th day of July, 1897, before me, Florence Couthou, a notary public in and for the county of Cook, State of Illinois, personally appeared Mary A. Davis, wife of Edward A. Davis, known to me to be the person

whose name is subscribed to the within instrument, and acknowledged to me that she executed the same.

In testimony whereof, I have hereunto set my hand and seal the day and year in this certificate first above written.

[Notarial Seal]

FLORENCE COUTHOU, I

Notary Public in and for the County of Cook, State of Illinois.

State of Montana, }
County of Silver Bow. } ss.

On this 19th day of August, 1897, before me, L. Orvis Evans, a notary public in and for the county of Silver Bow, State of Montana, personally appeared George W. Davis, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

In testimony whereof, I have hereunto set my hand and seal the day and year in this certificate first above written.

[Notarial Seal]

L. ORVIS EVANS, I

Notary Public in and for the County of Silver Bow, State of Montana.

State of Illinois, }
County of Cook } ss.

On this 13th day of July, 1897, before me, Nellie M. Lewis Panushka, a notary public in and for the county of Cook, State of Illinois, personally appeared Morris A. Davis, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

Davis, known to me to be the person whose name is subscribed to the within instrument, as administrator of the estate of John A. Davis, deceased, and acknowledged to me that he executed the same.

In testimony whereof, I have hereunto set my hand and seal the day and year in this certificate first above written.

[Notarial Seal] AUGUSTUS ANDERSON,
Notary Public in and for the County of Madison, Mon-
tana.

State of Massachusetts, }
County of Hampden. } ss.

On this 8th day of July, 1897, before me, George D. Lang, a notary public in and for the county of Hampden, State of Massachusetts, personally appeared Elizabeth S. Ladd and Charles H. Ladd, her husband, both personally known to me to be the individuals described in and whose names are subscribed to the foregoing agreement, and who severally acknowledged to me, each for himself and herself, that they executed the same.

In testimony whereof, I have hereunto set my hand and seal the day and year in this certificate first above written.

[Notarial Seal] GEORGE D. LANG,
Notary Public in and for the county of Hampden, State
of Massachusetts.

State of Massachusetts, }
County of Hampshire. } ss.

On this 8th day of July, 1897, before me, Wm. C. Eaton, a notary public in and for the county of Hampshire, State of Massachusetts, personally appeared Sarah Maria Cummings, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that she executed the same.

In testimony whereof, I have hereunto set my hand and seal the day and year in this certificate first above written.

[Notarial Seal] WM. C. EATON,
Notary Public in and for the County of Hampshire, State
of Massachusetts.

[Endorsed]: A. J. Davis et al. with Elizabeth S. Bowdoin et al. Contract dated June 22, 1897, No. 58. Harriet Wood vs. A. J. Davis et al. Complainants' Exhibit. Contract of Settlement. C. W. B., Spec. Examiner, June 21, 1898.

The next exhibit in regular order is record of bank suit, to be found commencing at p. 1091 of this record.

Complainant's Exhibit, "Notice to Produce."

(June 21, 1898, C. W. B., Special Examiner.)

*In the Circuit Court of the United States, Ninth Circuit,
District of Montana, Southern Division,***HARRIET WOOD,**

Complainant,

vs.

**ANDREW J. DAVIS, JR., FIRST NATIONAL BANK
OF BUTTE, MONTANA, JAMES A. TALBOTT,
Formerly Special Administrator, etc., of Andrew J.
Davis, Deceased; JOHN E. DAVIS, as Adminis-
trator etc., of John A. Davis, Deceased, and JOHN
H. LEYSON, as Administrator with the Will An-
nexed, etc., of Andrew J. Davis, Deceased,**

Defendants.

Sirs: Take notice that you are required to produce upon the hearings before Charles W. Blair, Esq., special examiner herein, the following papers now in your custody or control, or that of your clients, and that upon failure so to do, secondary evidence will be given in proof of the same:

A certain deed and contract dated June 22, 1897, between the defendants, Andrew J. Davis and others, and the complainant Harriet Wood and others.

Also a certain letter dated July 6, 1894, from W. C. Darnold to Andrew J. Davis, a copy of which is annexed to the bill of complaint herein.

Also all of the papers, books, documents, agreements, and other papers referred to in the bill of complaint herein or in the said agreement dated June 22, 1897, and all other books, papers, or documents in any way bearing upon the matters in controversy, and set forth in the said bill of complaint.

Dated, Butte, Montana, June 15, 1898.

W. L. LOGAN and

L. P. DRENNEN,

Solicitors for Complainant.

To W. W. DIXON and

FORBIS & FORBIS,

Solicitors for A. J. Davis, Jr., etc.

WILLIAM SCALLON,

Solicitor for Defendant, Talbott.

E. W. HARWOOD,

Solicitor for Defendant, John E. Davis.

J. W. COTTER and

WILLIAM SCALLON,

Solicitors for Defendant Leyson.

Due and timely service of a copy of the foregoing notice to produce is hereby admitted.

Dated, Butte, Montana, June 15, 1898.

WM. SCALLON,

For Talbott.

J. W. COTTER and

WM. SCALLON,

For J. H. Leyson.

JAMES W. FORBIS,

Atty. for Defts. A. J. Davis and The First National Bank.

E. N. HARWOOD,

Solicitor for John E. Davis, Adm. of John A. Davis, Decd.

[Endorsed]: No. 58. Wood vs. Davis, Complainant's Exhibit, Notice to Produce. June 21, 1898. C. W. B. Spl. Examiner.

Complainant's Exhibit, "Typewritten Letter, dated July 6th, 1898."

(June 21, 1898. C. W. B., Special Examiner.)

Butte, Mont., July 6, 1896.

Mr. A. J. Davis, Esq.

Dear Sir: Having made several unsuccessful attempts to meet and have an interview with you, and failed, I adopt this method of placing before you the circumstance as I see it. You are aware that in my testimony I strained a very great point, and in doing so accomplished for you 1072000.00 one million and seventy-two

thousand dollars, and I feel that any circumstances that might arise that would change or impeach that testimony would be both disastrous to you and myself. In order to avoid that I desire to place before you the following conditions, to wit:—

That you deal with me straight, and through no second or third parties, and that I bind myself to carry out every obligation that I have made. There is strong pressure brought to bear upon me to rescind my testimony or the portion of it as to dates, which I am fully guaranteed that if I do, will result in nothing disastrous to me, but, if you will comply with the requirements herein stated, I will quietly leave this country, and under no circumstances return again.

You know my family affairs, my wife will not come again to Montana, and I cannot live without her, and I was assured in my interview with her a few weeks ago that she would not come again, and I have this proposition to offer to you, and it will be a final, and it is not a hundredth part of what my, the only direct testimony in the case, of which I have been assured by the most eminent counsel in this country and Ohio is the case, that my own, and mine alone was the pivoting and only testimony which gained to you 1,072,000.00 dollars.

Now, to be candid, and as final to everything connected with these affairs, under no circumstances will it ever arise again through any pressure that may be brought to bear upon me by the opposing party, I will state that I want 10,000.00 ten thousand dollars, in consideration of which I agree to go back to Ohio, go into business, stay there, and return to Butte subject to no-

body's orders but your own, which may only effect subsequent business of your own, and that if you will deal with me personally, and with nobody else, I will religiously carry out every stipulation in this instrument.

I am very serious in this thing, and want you to know that I have positive assurance that if I rescind my testimony, even to the verge of perjury, that I will be fully protected to any amount. I do not do this in the form of a threat, but, only as a reasonable consideration for what I know I have done for you.

Candidly consider this without bias, weigh every point in the case. I place myself in jeopardy in doing this, yet I do it with my eyes open. No other consideration except the above stated will go. Give me a hearing at John Davis's store to-morrow at 2 o'clock P. M. as that is the extreme limit that I have from other sources.

Copy.

Yours truly,

The next exhibit in regular order is letter of Feby. 19, 1890, shown at page 262 of this record and is not here repeated.

Complainant's Exhibit, "Darnold Affidavit."

(No. 58. Harriet Wood et al. vs. A. J. Davis et al. Darnold Affidavit. Dated July 12, 1894. June 21, 1898. C. W. B., Spl. Examiner. Endorsed: McConnell, Clayberg & Gunn, Attorneys, Helena, Montana.)

In the District Court of the ——— Judicial District, in and for the County of Silver Bow, State of Montana.

JAMES TALBOTT, Special Administrator of the Estate of A. J. Davis, Senior, Deceased,

vs.

A. J. DAVIS, Junior, and the First National Bank of Butte.

State of Montana, }
Lewis & Clarke County, } ss.

Personally appeared before the undersigned, a notary public in and for said county and State, William C. Darnold, and made oath in due form of law that he is the same William C. Darnold who testified in behalf of the defendants in the above-entitled cause upon the trial of same in the District Court of Silver Bow county; that for several months before he did so testify, he had been drinking, and had at times taken chloral, when suffering from nervous prostration; that he was out of employment and des-

titute, and had been for sometime, and was much depressed in mind; that while in this morbid condition of mind, he delivered the testimony given upon said trial.

Affiant further states that said testimony was not true; that he had no such conversation as detailed in said testimony with A. J. Davis, Senior, Deceased, but that he did have a conversation with said A. J. Davis, Senior, deceased, about the latter part of August, 1886, at which time he was engaged as bookkeeper in the First National Bank of Butte, and had had some trouble with his books with the defendant, A. J. Davis, Junior, and in the conversation that he had about the last of August, 1886, with A. J. Davis, senior, he complained to him of the treatment of said defendant, A. J. Davis, junior, when the said deceased said to him that he had better go back to work, as Andy (referring to A. J. Davis, Junior) would eventually own the bank; that this was the only conversation he had with said Deceased in regard to the defendant, A. J. Davis, Junior, owning the bank; that all he stated upon the witness stand in reference to the conversation had with said Deceased shortly before he died, stating to him in substance that he had given the stock of the defendant, the First National Bank, to the defendant, A. J. Davis, Junior, is not true; that the said Deceased at said time and place, nor at any other time and place, made any such statement to him.

Affiant further states that, while no one had offered him any consideration, or made him any promises to induce him to give the above testimony, he was led to believe, while in the morbid condition of mind above referred to, that he would be liberally rewarded by the

defendants for so great a favor as giving the testimony which he did give would be.

Affiant further states that an hour or so after he had testified, one Myer Ganzberger, a resident of the city of Butte, with whom affiant was well acquainted, came to him on the street and asked him if he did not wish to take a drive to Gregson's Springs, situated about 18 miles from Butte City; that affiant agreed to go with said Ganzberger to said springs, and they went to a livery stable and procured horses and buggy and drove to said Gregson's Springs; that while affiant and said Ganzberger were at said Springs, said Ganzberger made arrangements with the proprietor thereof for affiant to return and spend some days at said springs, and that affiant did so return and remain there from Saturday until the following Thursday; that on Tuesday of the same week, said Ganzberger came to said Springs and proposed to affiant to go to California, but affiant said that he had been to California, but, if he was allowed to choose, he would prefer to go to his old home in Piqua, Ohio, and this was agreed to by said Ganzberger.

Affiant further states that, according to this agreement, he was taken by said Ganzberger to Piqua, Ohio, where affiant remained some two and a half weeks, but said Ganzberger went to Washington, D. C., or left affiant for the avowed purpose of going to said Washington City, and afterwards affiant received a telegram from said Ganzberger to meet him in Cincinnati, which affiant did, and they returned to Butte City, arriving there some ten or twelve days ago.

Affiant further states that said Ganzberger paid all of his expenses on this trip, and paid his bills, or had them charged to himself, at Gregson's Springs; that, while on said trip said Ganzberger said to affiant a number of times that, if he went through this all right, or words to that effect, that he would be well fixed for the remainder of his life.

Affiant further states that he makes this affidavit voluntarily, to the end that he may repair the wrong done by his testimony.

W. C. DARNOLD,

Affiant.

Subscribed and sworn to before me this 12th day of July, A. D. 1894.

[Notarial Seal]

O. W. McCONNELL,

Notary Public in and for the County of Lewis & Clarke.

Defendants' Exhibit "A," "Letter, Boyce to Mrs. Darnold."

(6-21, '98. C. W. Blair, Spl. Examiner.)

Butte, Montana, June 13th, 1894.

Mrs. Darnold, Piqua, Ohio.

Dear Madam: For past 6 mos. Mr. Darnold has been stopping at my house and treated as kindly as if he were related to us. There was nothing that my wife and self could do but what was done to add to his comfort and convenience. I relied upon Mr. Darnold to tell the truth and nothing but the truth in behalf of the co-partnership investment of Mr. A. J. Davis, deceased, wherein he invested equal amounts with me in the dry goods business, which the Bank came in and destroyed, and ruined me.

Mr. Darnold was my principal witness and knew the facts referred to. The Bank got Mr. Darnold to testify to a death bed gift of A. J. Davis to his nephew Andy Davis, and Mr. D. swore that he was present at his death bed in 1890, and for this testimony Andy Davis sent Mr. Darnold east in company with Mr. Meyer Gensberger, who accompanied as far as Piqua. The Bank is desirous of keeping Mr. Darnold away until my case comes off, thereby attempting to destroy his testimony in my behalf. I have never done Mr. Darnold an injury in my life. I have always had the kindest feelings for him, and why he should go away for a few paltry dollars and injure me is a mystery beyond my comprehension. As soon as I could recover money due me; I intended to go into business somewhere and have Mr. Darnold with me. I felt that I could do him good, and he likewise could be of service to me, and that he would be able to lead a useful life. Of course I am left to fight my battle alone, unless he is manly enough to come to my aid, and thereby not only do his duty as a man, but protect his interest as a good citizen. If you have influence over him, urge him to not leave me, and go at the call of men that would use him and then leave him to his own fate. They care nothing for him. They would not have given him home or shelter for one day, much less the months and months that I have stood by him. He must remember that this life is not all, and that the kindnesses shown him by my wife and self have been of a higher character than that which would debase him. If there is a spark of true manhood in him, have him remain where I can call him. The eastern creditor is getting ready to open their cases, and we

need Mr. Darnold. If he will write to Farwell & Co., and state to them the facts, or go to them, they will not only appreciate the interest he will take in assisting them to get their rights, but will not doubt give him employment, and will probably aid him in being the useful man that he has been in the past; and as soon as I recover from my losses, I will see that he shares my propperity. I ask nothing of him but Right, to aid me in overcoming Might. If you don't see him in person, forward this letter to him, that he may keep me posted as to his whereabouts. He did not bid us Good-Bye when he departed. Kindly give me his address, and I will keep up correspondence with him. Yrs. Respt.

J. R. BOYCE, Jr.

Defendants' Exhibit "B," "Letter, Boyce to Darnold."

(C. W. Blair, Spl. Examiner. 6-21, '98.)

Butte, Montana, Jan. 14th, 1896.

W. C. Darnold, Esq., Piqua, Ohio.

Dr. Sir: I wrote you some time ago, but received no reply. The cases of Eastern Creditors of the firm of J. R. Boyce, Jr., & Co. will come to trial in the next 60 or 90 days at farthest. Will you give testimony to the facts and truths known to you or not? If so, will you come here, or shall I send depositions to be sent you. I am preparing to follow with a suit; against the bank, for wrong procedure, for the \$60,000.00 investment, under an accounting, which has been twice paid to the bank. Thoroughman and Judge Henry L. Warren, formerly a Chief Justice of this State, will be here in my interests.

I hope to be successful against the bank. Inasmuch as I owe it largely to your knowledge of books in bringing to light the errors contained therein, I feel in duty bound to reimburse you for labor performed in the event I regain the losses sustained in and by the wrongful proceedings of the bank. Your knowledge of the firm books makes you a material witness in righting a wrong. As you know you will not have to strain a point in behalf of myself; all that is required is simply to tell the truth as to Davis' business relation with the firm. Your affidavit in regard to correcting a former wrong is safe in my hands. The Supreme Court has sustained the decision of Judge McHatton and given Andy the Bank. This ungrateful little rascal rolls in the wealth that you have given him, and unless he has given you something, more than he did while you were here for that which he knew was the only testimony that gave him the bank stock, he is inhuman, to say the least of it. At your command you can throw him behind the bars, for he paid you through his bro. and Meyer Gensberger for false testimony, when he knew that you were under the influence of liquor. He feels his security, however, and apparently fears no danger from either you,—or me—. I have no desire to heap vengeance upon any man, but must say that this is a cold-blooded transaction upon the part of Andy Davis, and there is many a poor fellow behind the bars that has done nothing compared to his acts. You did right in making an acknowledgment of your wrong; it was manly and just. Judge Noah McConnell's written guarantee to you was held sacred by Toole, Clayberg & McConnell. Why? Because Judge McConnell gave an written instrument to

you, which, if your affidavit had been used, would have gotten the Judge in a very grave position. I produced both documents, which were ret'd to me unused for reasons stated. Let me hear from you. Yours truly,

J. R. BOYCE, Jr.

Defendants' Exhibit "C," "Letter, Boyce to Darnold."

(June 21, 1898. C. W. Blair, Spl. Examiner.)

Butte, Montana, June 17, '94.

W. C. Darnold, Esq., Piqua, Ohio.

Dear Darnold: Notwithstanding you left, without bidding any of us good-bye, I cannot for one moment think that you have deserted me, just as we are on the eve of victory. Of course your evidence is material, inasmuch as you know the facts and are able to state truthfully your knowledge of same, so far as the partnership relations remaining unchanged up to the time of the death of Davis. I cannot believe that you would suppress this evidence, by remaining away under circumstances such as those that brought you to me, and your volunteer services in behalf of creditors and myself. I have frequently called attention to Farwell & Co. to the position you held and intended to mention in behalf of their interests and other creditors, reminding them of your telegram to them, &c., thus placing you before them as not only being worthy of recognition, but fully capable of holding important positions in their employ. I think they will recognize your interest in their behalf and will be able to aid you in getting a good situation until such a time as you may do better. You well know the great wrong that

has been perpetrated upon eastern creditors and myself, and you cannot conscientiously remain silent from any standpoint, and close your lips against such infamy. I cannot believe that money would induce you to remain away, and thus suppress the truth of your knowledge, particularly as my acts have been uniformly kind and generous in feeling. I had no motive in my kindness and the extenuation of home courtesies farther than to bring out the truths, too well known to be suppressed. You well know that my home was always open to you, and you were welcome therein. Whether I needed your evidence or not. You also know that there are "patched up" entries on the books of J. R. B., Jr., & Co., which should be exposed in the interests of truth and honor. That these entries were made by unscrupulous persons for purposes too base to dwell upon. That conscience caused one of them to admit, on death bed, that said entries were false and would in time redound to my credit. My faith in you has not been weakened, and I believe that when the time comes you will not be found wanting.

I confess that this faith in you is of a character that cannot be shaken until positive proof is shown that you are lower in the scale of manhood than others that have so deeply wronged me. I have always known you as an honest man; you proved yourself as such when in our employ. Now that you are more mature in thought and ripe in experience, it can not be possible that you would wantonly absent yourself and thus do me a greater wrong by silence than to be openly and avowedly my enemy. So far as I am personally concerned, it matters but little whether or not I regain my rights. I am willing to go

unrewarded so far as this world's goods are concerned, but to suppress the truth, withhold same, to detriment of other's interests, when in our power to restore their rights that so largely rest in us, is a crime against justice, to say nothing of that greater crime against the Higher Law given us by those God-given-powers, which forms the basis of all transactions both here and hereafter. The restoration of these rights will bring us power, and strength such as any mercantile community must recognize, and will recognize in time, to our own good. We have a two-fold interest at stake, one of them is self-respect (the foundation of true manhood). The other the restoration of rights that are lost and can only be regained through us. Can we pass either of these by and be honest men? We are all beset with temptations, and often allow evil thoughts to carry us astray, but manhood again reasserts himself, and we live beyond the allurements which selfishness has at one time placed her signet upon. We are all weak at times and easily "played upon." The lute of our souls catch the unnatural strains of self-polluted gains, and we often further schemes as cruel as those enacted in the Darker Ages. Re-asserted manhood regains her lost strength and conscience (that silent monitor), that remained dormant under the throes of selfishness, comes back again gently stealing through our breasts, and we throw open wide the gates that she may re-enter and purify the inner man. We then bid defiance to the boldness of our would-be possessor, and put him to shame for having wrung from us (to his own advantage) an independence for which he casts a morsel at our door. Neither you nor I are men to be used solely for unholy

purposes by intuition, education and inclination, we are just and true. Are we to be "played" upon and then "spit" upon? Can we further the interests of those that are waging an unholy war upon others? I cannot believe that you will do me an intended wrong, while I confess that your sudden going was a mystery, yet I am loathe to think you have gone for good. Your testimony in regard to the dying gift (the death-bed gift), of Judge Davis to Andy was a surprise that gave Andy a million of dollars (for upon your evidence alone rests his case). Other evidences were far "fetched,"—yours being being the last words of a dying man, passing from life, to give an account in death. Of course, I was astonished that you alone held the key of Andy's fate. I well knew of your conversation with the Judge, as you related it to me; that occurred in 1887, when Andy discharged you and you went to the sick-room of the Judge in that year, 1887, but did not know that you were present at the last moments of the Judge in 1890. Upon your words "hung the law and the testimony," and Andy's claim for the bank. Now that he has it, let him enjoy it, but let us not forget to bring out the truth and make him disgorge wrongful gains, which he holds under the law, but in violation of truth and the facts best known to yourself and myself. Kindly write me, and say if you will return in the interest of justice. I will see that you have transportation furnished, &c., "both ways." In the meantime apply to Farwell & Co. for a position, and in the end we will gather strength and regain our losses and former standing. With kind wishes, I am, Yrs. &c.

J. R. BOYCE, Jr.

Complainant's Exhibit, "Copy Darnold Letter."

(June 21, '98. C. W. B., Spl. Examiner. Endorsed:
Copy of Letter, W. C. Darnold to A. J. Davis, Jr.
Attested by J. H. Curtis.)

Copy of letter read by me. J. H. C.

Copy of typewritten letter handed me by W. C. Darnold. J. R. B., Jr.

Butte, Mont., July 6th, 1894.

A. J. Davis, Esq.

Dear Sir: Having made several unsuccessful attempts to meet and have an interview with you, and failed, I adopt this method of placing before you the circumstance as I see it. You are well aware that in my testimony I strained a very great point, and in doing so accomplished for you one million and seventy-two thousand (\$1,072,000) dollars, and I feel that any circumstances that might arise that would charge or impeach that testimony would be both disastrous to you and myself. In order to avoid that, I desire to place before you the following conditions, to wit: That you deal with me straight and through no second or third parties, and that I bind myself to carry out every obligation that I have made. There is strong pressure brought to bear upon me to rescind my testimony, or the portion of it as to date, which I am fully guaranteed that if I do, will result in nothing disastrous to me, but, if you will comply with the requirements herein stated, I will quietly leave this country, and under no circumstances return again.

You know my family affairs; my wife will not come again to Montana, and I cannot live without her, and I was assured in my interview with her a few weeks ago that she would not come again, and I have this proposition to offer you, and it will be a final, and is not a hundredth part of what my—the only direct testimony in the case, of which I have been assured by the most eminent counsel in this country and Ohio in the case, that my own and mine alone was the pivoting and only testimony which gained to you one million and seventy-two thousand (\$1,072,000) dollars. Now to be candid and as final to everything connected with these affairs, under no circumstances will it ever arise again through any pressure that may be brought to bear upon me by the opposing party, I will state that I want ten thousand \$10,000.00 dollars, in consideration of which I agree to go back to Ohio, go into business, stay there and return to Butte subject to nobody's orders but your own, which may only effect subsequent business of your own, and that if you will deal with me personally and with nobody else, I will religiously carry out every stipulation in this instrument.

I am very serious in this thing and want you to know that I have positive assurance that if I rescind my testimony, even to the verge of perjury, that I will be fully protected to any amount. I do not do this in the form of a threat, but only as a reasonable consideration for what I know I have done for you. Candidly consider this without bias, weigh every point in the case. I place myself in jeopardy in doing this, yet I do it with my eyes open. No other consideration except the above stated will go. Give me a hearing at Jno. Davis' store to-morrow at 2

o'clock P. M., as that is the extreme limit that I have from other sources.

(Signed) Yours truly,

W. C. DARNOLD.

(True copy.)

[Written in margin:] Copy of letter read by me.
J. H. C. July 7, 1894.

Defendant's Exhibit. (Endorsement.)

(C. W. B., Special Examiner.)

Law office of Corbett & Wellcome, Butte, Montana.
Property of J. R. Boyce.

Original affidavit and copy of letter of Darnold in re Darnold evidence in bank stock case.

Complainant's Exhibit "A," "Subpoena Duces Tecum."

(June 30, 1898. C. W. B., Special Examiner.)

The President of the United States to Andrew J. Davis, Jr., President of the First National Bank of Butte, Montana, Greeting:

You are hereby commanded that all business and excuses being laid aside, you appear and attend before Charles W. Blair, Esq., a special examiner duly appointed by the Circuit Court of the United States for the District of Montana, and authorized to examine you as a witness in a suit in equity, depending undetermined in the said Circuit Court, wherein Harriet Wood is complainant and Andrew J. Davis, Jr., and others are defendants, on the part of the complainant at the United States courtroom in the Postoffice building at the City of Butte, Montana, on the 30th day of June, 1898, at 2 o'clock in

the afternoon to answer truly all such questions as shall then and there be asked of you.

And you are further commanded to bring and produce with you at said time all books, accounts, papers and other documents of the First National Bank of Butte, Montana:

1. Showing or tending to show any indebtedness to said bank from any of the following persons, in the year 1894, and especially in May of 1894, viz.: Conrad Kohrs, Daniel W. Dillinger, Geoffrey Lavelle, Joseph Broughton, W. W. McCracken, Charles Eltinge, J. E. Gaylord, George A. Tong, D. L. Balch, Charles F. Mussigbrod, William H. Heald, Charles S. Warren, Hiram Knowles, James A. Talbott, John E. Davis, William I. Lippincott, Guy X. Piatt, Meyer Gansberger.

2. Showing or tending to show any indebtedness of John H. Leyson to said bank in 1895, and in March, 1895, and since then, and also the accounts of said Leyson with said bank.

3. And also showing or tending to show who were stockholders of said bank on March 11, 1890, and who have since been stockholders of said bank.

4. And also showing or tending to show what persons were directors and officers of said bank on March 11, 1890, and who the directors and officers have been since then.

5. And also all books or documents showing or tending to show all dividends paid the stockholders of said bank since March 11, 1890, and all the amounts divided as surplus or undivided profits during such time.

6. Also all books showing or tending to show all moneys, profits or dividends drawn by Andrew J. Davis,

Jr., since March 11, 1890, and all amounts to the credit of Andrew J. Davis, Jr., in said bank.

7. And also all books showing all moneys drawn by or paid to James A. Talbott during said time as well as the accounts of said Talbott with said bank.

8. Also all books, documents and all papers showing all transactions between William C. Darnold and said bank or said Andrew J. Davis, Jr., or said John E. Davis or said James A. Talbott since January first, 1894.

10. Also a certain proxy to vote upon the stock of Andrew J. Davis, deceased, issued for the meeting held in January, 1890.

11. Also all other books, documents or papers in possession of said bank in any way bearing upon or affecting the matters in controversy in said action.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States at the city of Butte, Montana, on the 29th day of June, in the year one thousand eight hundred and ninety-eight, and of the independence of the United States of America, the one hundred and twenty-second.

[Seal]

GEO. W. SPROULE,

Clerk.

By Charles W. Blair,

Deputy Clerk.

W. S. LOGAN, and

C. P. DENNEN,

Solicitors for Complainant, 115 North Main St., Butte, Montana.

[Endorsed]: Filed June 30th, 1898. Geo. W. Sproule, Clerk. By Charles W. Blair, Deputy Clerk.

United States Marshal's Office, }
District of Montana. }

I hereby certify that I received the within writ on the 29th day of June, 1898, and personally served the same on the 30th day of June, 1898, on Andrew J. Davis, Jr., President of the First National Bank of Butte, Montana, said witness named therein personally at Butte, in the county of Silver Bow, in said District, by delivering to and leaving with said witness a copy thereof.

Butte, June 30th, 1898.

J. P. WOOLMAN,

U. S. Marshal.

By David Meiklejohn,

Deputy.

[No. 58. Harriet Wood v. A. J. Davis et al. Complainant's Exhibit "A." Filed June 30th, 1898. C. W. B., Special Examiner.]

Complainant's Exhibit, "Bank Statement."

(July 6, 1898. C. W. B., Special Examiner.)

Statement of the condition of the First National Bank, Butte, Montana, at close of business, March 9th, 1897.

Resources.

Loans and discounts.....	\$1,369,836.37
U. S. Bonds to secure circulation par value.	50,000.00
Other bonds and securities.....	126,431.03
Bank building and other real estate.....	18,000.00
United States Bonds on hand....	150,000.00
Due from banks.....	736,994.05
Cash on hand.....	595,599.61
Cash resources.....	1,482,593.66
	<hr/>
Total.....	\$3,046,861.06

Liabilities.

Capital stock.....	\$ 200,000.00
Surplus and undivided profits.....	396,286.15
Circulation.....	42,400.00
Dividends unpaid.....	7,500.00
Deposits.....	2,400,674.91
	<hr/>
Total....	\$3,046,861.06

*In the Circuit Court of the United States, for the District of
Montana.*

HARRIET WOOD,

Complainant,

vs.

ANDREW J. DAVIS et al.,

Defendant.

Deposition of J. B. Clayberg.

The complainant in the above-entitled suit, and her attorneys, are hereby notified that the defendants herein will take de bene esse the testimony of John B. Clayberg, who resides at the city of Helena, in the State of Montana, who is about to go out of the District of Montana, in which the above suit is to be tried, and to a greater distance than 100 miles from the place of trial of said suit, before the time of said trial, for use at the trial hearing of said suit, on behalf of the defendants before Harry Harris a notary public, within and for the county of Lewis & Clarke, State of Montana, and who is not of counsel or interested in said suit, at room No. 31, in the Bailey Block, Main street, in the city of Helena, Lewis & Clarke county, Montana, on the 6th day of September, 1898, commencing at 2 o'clock P. M. of said day, and thereafter from day to day as the taking of said deposition may be adjourned, and such testimony will be

so taken in accordance with the provisions of sections 863, 864, and 865, R. S. U. S., and the equity rules.

Dated at Butte, Mont., Aug. 31, 1898.

(Signed) W. W. DIXON,
 J. A. COTTER,
 JOHN F. FORBIS, and
 WM. SCALLON,
 Solicitors for Defendants.

To C. P. DRENNAN, Esq.

Complainant's Solicitor, Main street, Butte, Montana.

State of Montana, }
 County of Silver Bow. } ss.

J. K. MacDonald, being duly sworn deposes and says that he is a citizen of the United States and over the age of twenty-one years; that on the 31st day of August, 1898, he served upon C. P. Drennan, Esq., solicitor for the complainant in the case of Harriet Wood, complainant, vs. Andrew J. Davis, Jr., et al., defendants, a notice of which the foregoing is a true copy. That such service was made by personally delivering to and leaving with the said C. P. Drennan, personally, the original of said notice at his office on North Main street, Butte, Montana. And affiant further deposes and says that he is in no wise interested in said action.

J. K. MacDONALD.

Subscribed and sworn to before me this 5th day of September, 1898.

CHAS. F. ROE,
 Notary Public in and for the County of Silver Bow,
 State of Montana.

*In the Circuit Court of the United States, for the District of
Montana.*

HARRIET WOOD,

Complainant,

vs.

ANDREW J. DAVIS et al.,

Defendants.

Be it remembered, that pursuant to the notice hereunto annexed, and on the sixth day of September, in the year of our Lord one thousand eight hundred and ninety-eight, at my office, room 31, Bailey Block, in the city of Helena, county of Lewis and Clarke, and State of Montana, at the hour of two o'clock P. M., before me, Harry Harris, a notary public in and for said county of Lewis and Clarke, duly appointed and commissioned to administer oaths, personally appeared John B. Clayberg, of lawful age, who being by me first duly sworn and cautioned to testify the truth, the whole truth, and nothing but the truth, touching the matters in controversy in the above-entitled action, was then and there examined and interrogated by W. W. Dixon, Esq., one of the solicitors for the defendants, the complainant not being represented by counsel, and thereupon said witness did depose, testify and say, as appears in his answers to the interrogatories following, to wit:

Direct Examination.

(By W. W. DIXON, Esq.)

What is your name and residence?

A. John B. Clayberg; reside at Helena; 44 years old and occupation attorney.

Q. How long have you resided in Montana?

A. Nearly fourteen years.

Q. What is your business?

A. I am an attorney.

Q. How long have you been engaged in such business in the territory and State of Montana?

A. Since 1884.

Q. How actively have you been engaged in the practice of law in Montana and in what courts?

A. I have been engaged in all the courts of Montana rather actively, both State and Federal Courts.

Q. And in the Supreme Court of the United States?

A. Yes, sir.

Q. What official positions if any, have you held in the territory and State of Montana?

A. Nothing but attorney general. I was the last attorney general of the territory.

Q. Are you acquainted and have you been connected with the litigation in relation to and growing out of the estate of Andrew J. Davis, deceased?

A. I have.

Q. Well, how long and how intimately?

A. I think it was in the year 1890 that I was first employed, and I have been in the different cases ever since.

Q. State in what matters relating to said estate you have been employed as attorney.

A. I was employed as attorney in the Supreme Court upon the matter of the administration of the estate, and afterwards—(interrupted)

Q. By the way, were you in the District Court in that contest in the administration?

A. No, I was not in that; I was in the higher court first.

Q. Go on, then.

A. And I was in the District Court on the probate of the will and the various matters of litigation that grew out of that, and also as attorney for Mr. Leyson, the administrator, in the case concerning the bank stock.

Q. That is called the bank stock case?

A. Yes, sir.

Q. By whom were you employed in the matter relating to said estate aside from the bank stock?

A. I was employed by Mr. Root, and the people who were with him.

Q. Who were they?

A. Mrs. Cornue, his sister, Mrs. Cummins, his aunt, Mrs. Ladd, his aunt, and Miss Dunbar, his cousin.

Q. Did you give Root's name?

A. Henry A. Root; I did not give it.

Q. Well, who was Mr. Root?

A. Mr. Root was a nephew of Andrew J. Davis, deceased.

Q. Was he or not one of the heirs of Andrew J. Davis?

A. Yes, sir; he was.

Q. That is, supposing he died intestate?

A. Yes, sir; he was heir at law.

Q. What was the nature of the proceedings in relation to the appointment of an administrator of the estate?

A. As I recollect it, John A. Davis, a brother of the deceased, and Henry A. Root both applied for letters of administration, and the contest was upon the appointment of John A. Davis, as I recollect.

Q. What court was that contest in?

A. It was in the District Court of Silver Bow county, and was afterwards appealed to the Supreme Court. I appeared in the Supreme Court; did not appear in the District Court; had nothing to do with it there.

Q. In what court was the contest in relation to the will pending?

A. In the District Court of Silver Bow county, in Butte.

Q. Were you engaged in that as counsel?

A. I was, upon the contest of Henry A. Root and Maria Cummings?

Q. What was the result of the trial?

A. The jury disagreed.

Q. State, if you know, who were the attorneys for James A. Talbott, administrator of the estate of Andrew J. Davis, deceased, in the suit against Andrew J. Davis, and the First National Bank of Butte, called the bank stock case?

A. Toole & Wallace, McConnell, Clayberg & Gunn, and W. F. Sanders.

Q. Who attended to the trial of the case in court?

A. E. W. Toole, W. F. Sanders and myself.

Q. Do you recollect what year that was?

A. I think it was in '94; I think it was commenced in '94, I am not sure.

Q. Who employed you or your firm in that suit?

A. Mr. Talbott.

Q. Who paid your fees in the case?

A. Mr. Talbott paid a portion of them and after the permanent administrator Mr. Leyson was appointed, he paid the balance.

Q. If I understand you correctly, the firm of which you were a member and Mr. Toole, were interested in this litigation, but you and Mr. Toole took the active part?

A. That is right.

Q. Who was the McConnell who was at that time a member of the firm of McConnell, Clayberg & Gunn?

A. N. W. McConnell, at one time Judge of the Supreme Court of the State of Montana.

Q. In the appeal of the bank case to the Supreme Court of the State of Montana, who attended to the case on appeal and argued it?

A. I think Mr. Toole and I argued the case on appeal.

Q. Did you or not prepare briefs in that case?

A. I did, I think.

Q. Mr. Toole, also? A. Yes, sir.

Q. Did you or not take part in the bank stock case when it was appealed to the Supreme Court of the United States?

A. Yes; I did not prepare any brief on that matter; Mr. Toole prepared it. I discussed the matter with Mr. Toole.

Q. Have you or not been employed as counsel for Mr. Root and the persons associated with him in everything

connected with this Davis estate, since you first went into it?

A. I think everything except a controversy between Root and Mrs. Ladd that is now pending in the United States Court in Butte.

Q. Have there or not, Mr. Clayberg, been a great many legal matters, negotiations and compromises between Mr. Root and his associates and the other parties interested in the Davis estate?

A. Yes, sir; there have been a great many compromises and settlements.

Q. Did you participate in those?

A. I think I did in every one of them.

Q. What interest, if any, had Mr. Root and his associates in this bank stock case?

A. As heirs at law to deceased in the estate of A. J. Davis; had we won the bank stock case, it would have increased the assets of the estate.

Q. Well, in this bank stock case, were you or not representing Mr. Talbott, as well as Mr. Root and his associates?

A. Yes, sir; I think we were. Mr. Talbott, when he employed us, told us he employed us because we had been attorneys for some of the heirs at law and for that reason he said he employed us.

Q. The interest of Mr. Talbott as administrator and Mr. Root and his associates was the same, was it not?

A. Yes, sir; it seemed to me to be so in that case.

Q. When Mr. Talbott employed you and Mr. Toole in this bank stock case, state, as near as you can remember,

what directions and instructions he gave you in regard to the conduct and prosecution of the case.

A. His instructions were to go ahead and fight it to the best of our ability and win it if we possibly could.

Q. State whether or not Mr. Talbott stated to you what he knew about the case himself or what facts he knew in reference to it.

A. I don't think I ever had any talk with Mr. Talbott concerning the facts in the case. Mr. Toole I had several talks with; Mr. Talbott I don't think I ever had.

Q. Did you afterwards?

A. I don't think I did at all.

Q. You had no special instructions from him, then, as I understand it, further than to go ahead and do the best you could with the case?

A. No, sir; I did not recollect of any at all.

Q. Did you or not at that time that he had been present at the time of the alleged gift of the stock?

A. I knew that he testified in the District Court of Silver Bow county on the matters of administration that he was present and testified concerning the gift.

Q. Had you or not seen his testimony?

A. Yes, sir; I had.

Q. Given on the hearing of the application for letters of administration? A. Yes, I read it all.

Q. Do you know Mr. Leyson, administrator of the will annexed? A. Yes, sir.

Q. State whether or not he ever employed you or Mr. Toole.

A. Yes, sir; after he was appointed administrator he instructed Mr. Toole and I to go ahead with the case.

Q. What instructions, if any, did you receive from Mr. Leyson?

A. I think nothing further than to argue the case in the Supreme Court and to do what we could in regard to it.

Q. Please state, Mr. Clayberg, whether or not Mr. Talbott or Mr. Leyson ever told you or intimated to you in any way, that they or either of them, desired you to do anything in the bank stock case to favor Mr. Davis' claim to the stock.

A. No, sir; they did not.

Q. Do you know Mr. James R. Boyce, Jr.?

A. Yes, sir.

Q. State whether or not he was a witness in the District Court on the trial of the bank stock case.

A. He was.

Q. For whom?

A. I think he was called for the plaintiff.

Q. Do you know whether or not Mr. Boyce made an affidavit in the motion for new trial?

A. Yes, sir; he did.

Q. Does that appear in the transcript of the proceedings?

A. Yes, sir.

Q. Have you read Mr. Boyce's testimony given in this suit?

A. Yes, sir.

Q. Do you know Mr. Darnold—Mr. William C. Darnold?

A. I never knew him or saw him until he testified on the stand in that case.

Q. Was he also a witness on the trial of the bank stock case?

A. Yes, sir; a witness for defendant; I have never seen him since.

Q. State, if you know, what Mr. Boyce told you in reference to the entries in the books of J. R. Boyce, Jr., & Co., claimed to have been made by Darnold?

A. My recollection is that, after he was on the witness stand, he told us that Mr. Darnold had made entries or had directed his then bookkeeper to make entries after he had ceased to be employed by J. R. Boyce & Co. I don't think he ever told us that until after he was on the stand; he told us before he went on the witness stand that Mr. Darnold worked for the firm of which he was a member until the first day of March, and that there were entries made by him in the books of the firm during the month of February.

Q. When did he tell you that?

A. It was during the trial of the case before he was placed on the stand.

Q. Before Boyce was placed on the stand?

A. Yes, sir.

Q. State whether or not Mr. Boyce was examined on the stand in reference to this matter.

A. My recollection is that he was.

Q. State whether or not Boyce then testified as to the entries in the books by Darnold.

A. My recollection is that he did.

Q. State, if you remember, whether or not you and Mr. Toole asked Mr. Boyce to produce the books or examine them in reference to the dates of entries.

A. I do not know what Mr. Toole may have done; I never saw the books at all.

Q. Do you know whether or not Mr. Boyce was requested to produce them for your inspection?

A. I do not recollect.

Q. Who attended particularly to the matter of Boyce's testimony, if you remember?

A. Mr. Toole had a good deal more to do with it than any of the rest of us; he talked with Mr. Boyce and conducted the examination.

Q. You have seen, have you not, a transcript of the testimony given in the proceedings for letters of administration in 1890?

A. Yes, sir.

Q. Do you remember from that transcript whether or not Andrew J. Davis, Jr., testified in that matter?

A. I believe he did.

Q. Did you or not ever see the record of his testimony?

A. What record do you mean?

Q. Transcript of the testimony?

A. I saw the record on appeal to the Supreme Court, and I also saw a copy that was given to Mr. Toole, I believe, by the stenographer of the court who took his testimony.

Q. At or before the trial of the bank stock case had you not seen transcripts of testimony of A. J. Davis, Jr., given on the hearing for letters of administration?

A. Yes, sir; I had.

Q. Was or was not the testimony of A. J. Davis, Jr., given in the case of the application for letters of administration, read or used on the trial of the bank stock case?

A. I don't think it was.

Q. State, if you know, why it was not used.

A. My recollection of it is that Mr. Toole and Mr. Sanders took the position that if his testimony given in the matter of the application for letters of administration was used he would have an opportunity to come in and explain, and for that reason, they having objected to his being sworn as a witness in the case, they thought it best not to put his testimony in. I will say that my own judgment in reference to that was that he could not say anything except that the stenographer had not correctly taken down his testimony, or deny the matter stated in the testimony, but I agreed with Mr. Toole and Mr. Sanders that it was not advisable to put it in.

Q. Was it for that reason that you did not introduce it? A. Certainly.

Q. Was or was it not discussed at length?

A. It was discussed at length several times between Mr. Toole, Mr. Sanders and myself.

Q. Did or did not counsel confer as to the advisability of putting it in? A. Yes, sir; we all conferred.

Q. State, if you know, Mr. Clayberg, from the transcript on appeal in the Supreme Court in the matter of the application for letters of administration on the estate of Andrew J. Davis, deceased, what the issue in that case was, and how this testimony of A. J. Davis came in.

A. My recollection is that the A. J. Davis testimony came in in reference to the amount of the estate; if the bank stock had been delivered to him and given to him, it was not a part of the estate, and if it had not, it belonged to the estate and increased the assets considerably.

Q. Well, would it or not, also make a difference in regard to the bond?

A. Yes, sir; it certainly would require a larger bond if it belonged to the estate.

Q. State, if you remember, whether Andrew J. Davis testified on the trial? A. No, sir.

Q. Why not?

A. He was offered as a witness, but we objected to his being sworn because the testimony he would give was equally within the knowledge of the deceased.

Q. And what did the Court rule on the objection?

A. The Court excluded the matter.

Q. State, if you remember, whether Mr. Talbott testified on the trial of the application for letters of administration. A. Yes, sir; he did.

Q. Was or was not his testimony reported and taken down? A. It was.

Q. Was, or was not his testimony in that proceeding used upon the trial of the bank stock case?

A. He was asked upon cross-examination by Mr. Toole many of the questions that had been asked him in his former testimony and his reply was given, and he was asked whether or not he so testified.

Q. So that the testimony appeared in the record?

A. All that we considered material appeared in the record.

Q. Did you or not, or did or did not any of the counsel for plaintiff in the case, so far as you know, ever receive any direction or instruction from Mr. Talbott, as to the introducing or excluding on the trial of the bank stock

case, the testimony of Andrew J. Davis, as given on the hearing?

A. So far as I am concerned, I never had any conversation with Mr. Talbott in regard to it, and I do not think any of the others did.

Q. Is Mr. Henry A. Root an attorney?

A. Yes, sir.

Q. State whether or not during the progress of the trial of this bank stock case you and the other counsel for Mr. Talbott did or did not consult with Mr. Root in regard to the matters in the case.

A. Yes, sir; I know Mr. Toole and myself consulted with Mr. Root.

Q. Do you remember whether or not you consulted with him in regard to the propriety of introducing Andrew J. Davis' testimony given on his application for letters of administration?

A. I don't remember whether we did or not.

Q. Have you or not read the transcript of the testimony taken in this suit on the part of the complainant in regard to a certain affidavit made by one W. C. Darnold, relating to what he had testified to on the trial of the bank stock case?

A. Yes, sir.

Q. State, if you please, all that you know about that affidavit—how it came to be made, what became of it, and all you know in regard to it.

A. I was in the east at the time the affidavit was made and did not know anything about it—in fact, never saw the affidavit. I had heard that such an affidavit was made, but it never came into my possession, and I never saw it in fact.

Q. Did you or not ever have any conversation with Mr. Darnold in regard to it?

A. No, sir; never spoke to him at all.

Q. Was or was not the question of using that affidavit on the motion for a new trial of the bank stock case ever discussed between yourself and the other counsel for the plaintiff?

A. Yes, sir, it was with Mr. Toole, and I think with Colonel Sanders also.

Q. Had the facts and circumstances under which that affidavit was procured been stated to you?

A. I think they were.

Q. And what, if you remember, was the conclusion reached in regard to the propriety of using it or not using it on the motion for a new trial?

A. My recollection is that it was stated by Mr. Toole that the affidavit was made by Judge McConnell, and that he gave Mr. Darnold his word that it would not be used unless he would not be prosecuted for perjury. We then took the affidavit of Mr. Boyce and Mr. Curtis to whom Mr. Darnold had made confession. We thought that it might involve Judge McConnell to introduce Darnold's affidavit, and inasmuch as we had the affidavits of Curtis and Boyce to whom he had made confessions, we felt that they ought to be equal to his affidavit.

Q. Were you present in the office of Corbett & Welcome—I think the firm was then in Butte—when this affidavit of Darnold's was produced and discussed?

A. No, sir; I do not think I was in the State at the time. I left Chicago on the 11th day of July and arrived

here on the 14th. I examined my correspondence this morning and find that on the 14th I sent a telegram to William Allen Butler, Jr., from here, and my recollection is that I sent it immediately upon my arrival.

Q. You do not think you were present, then?

A. No, I was not present.

Q. Did you or not, during the trial of the bank stock case and afterwards, have conversations with James R. Boyce, Jr., in regard to what he knew about the case?

A. Not personally and alone. I was present, however, when his affidavit was made and heard all that was said then.

Q. At the time that affidavit was made or before, so far as you know, was everything included in that affidavit that you or the other counsel thought material and that Mr. Boyce told you at that time?

A. I think it was; there were a good many things set forth in the affidavit that I had never heard of until the affidavit was made; for instance, his statement that Andrew J. Davis said certain things to him on the day of the funeral and at other times. I never knew anything about it until the affidavit was made on motion for a new trial. That affidavit, as I recollect it, was drawn in the McDermott hotel by a stenographer in the presence of Col. Sanders, Mr. Toole and myself.

Q. Did it or not at that time include everything that Boyce told you was material?

A. Yes, sir; everything that had not been brought out in the trial of the case; everything that he communicated to us after the trial of the case, that we thought was at all material, was placed in that affidavit.

Q. State, if you know, what interest, if any, James R. Boyce had in this bank stock case, directly or indirectly.

A. I know of no interest he had in it, but I heard that he had some suit with the estate concerning the partnership, but I never knew anything about it; it was all hearsay.

Q. Have you read the testimony of Mr. Frank E. Corbett given in this suit, upon the part of the complainant?

A. Yes, sir.

Q. Mr. Corbett is associated with you as a partner in the law practice now?

A. Yes, sir; and has been since January, 1897.

Q. Was he at the time of the trial of the bank stock case? A. No, sir.

Q. Did Mr. Corbett, at the time of the trial of the bank stock case, have any interest in it or represent any one interested in it?

A. He was not an attorney of record although both he and Mr. Welcome were employed by Mr. Root, and they were very much interested in the matter because of the fact that Root and the other people were interested in it. I suppose he took great interest because he was Mr. Root's attorney.

Q. Did Mr. Corbett or Mr. Welcome, or either of them, talk with you or the other attorneys in reference to the case?

A. It is so long ago, I can't remember exactly; I think probably they did with me. I don't know as to the others.

Q. Did you observe in the testimony of Mr. Frank E. Corbett, given in this case, where he stated that he con-

sidered Mr. Andrew Davis' testimony on the application for letters of administration very important and talked with you about it?

A. I believe I saw that in his testimony.

Q. And in the same connection did you observe that Mr. Corbett testified that you at that time made the remark to the effect how could you put in the testimony when your client would not allow you?

A. Yes, I saw it.

Q. You have read his testimony? A. Yes, sir.

Q. What have you to say in reference to that?

A. I think Mr. Corbett is mistaken in regard to it. I have no recollection of ever making any such statement as that.

Q. Can you recollect anything in reference to the matter you said to him?

A. No, I cannot. We probably had a good many talks about it, but I can't recall what was said.

Q. Do you remember whether or not you talked over the importance of Andrew J. Davis' testimony?

A. I presume I did. I know there were several conversations concerning the case, and I presume there was something said concerning the testimony of Andrew J. Davis.

Q. Would you or not remember, Mr. Clayberg, if you had made such a remark as that?

A. I think I would.

Q. What would you have considered it as proper to do as an honorable attorney, in a case like the bank stock case, where your client and the plaintiff was acting in a

fiduciary capacity, if he had advised or requested you to omit any testimony that was material?

A. I don't think I would have paid any attention to it; all of us insisted that Mr. Talbott's testimony was directly against us, and our instructions were to go ahead and do the best we could, in the case. I don't think we would have listened to any suggestion he might have made as to the putting in of testimony.

Q. Did he at any time give you any directions or instructions as to what testimony you should put in or leave out?

A. He never did to me. I don't think he did to anyone.

Q. In the matter of admitting this testimony of Andrew J. Davis, did you or the other counsel in the case, so far as you know, follow anybody's direction or advice, or did you act upon what you thought was best for the interest of your clients in the case?

A. I don't think anybody gave us any directions in regard to it at all. We acted according to what we believed to be the best interests of the case.

Q. When did you return to Montana—lately, Mr. Clayberg?

A. I arrived in Montana last Thursday, the first day of September.

Q. How long before that time had you been away from Montana?

A. I left Montana the latter part of June, the 20th or 21st, as I recollect it.

Q. And were not here until you returned on the 1st of this month?

A. No, sir.

Q. Whereabouts were you?

A. I was in California for some three or four weeks, and since that in Oregon, near Astoria, at the Gearhart Hotel and at the Flavel Hotel.

Q. What was the cause of your leaving Montana in June?

A. In May, the 6th or 7th day of May, I was taken ill, and was confined to my bed some six weeks; as soon as I was able I went to the coast for my health; went to regain my health, if possible.

Q. And remained absent on account of your health?

A. Yes, sir.

Q. What is the condition of your health now?

A. It is very much improved.

Q. Do you have any expectation of leaving Montana shortly?

A. It entirely depends upon how my health remains. If it remains good and I find that I can do work in my office I shall remain here; if not I shall go away again.

Q. In case your health requires you to go away from Montana would you expect to leave the State?

A. Yes, sir.

Q. And go out of this district?

A. Yes, sir; I would expect to go east somewhere, possibly to the Hot Springs, Arkansas.

Q. Does your going or not depend upon the condition of your health hereafter?

A. Yes, sir; entirely so.

Q. I believe you have stated in your examination that you never had any conversation yourself with Mr. Darnold?

A. No, sir; I never had any talk with him.

Q. That is correct, is it?

A. Yes, sir.

Q. State what you know, if you know anything, with reference to the endeavor upon the part of the plaintiff on the motion for a new trial of the bank stock case, to procure the affidavit of John B. Wellcome.

A. Mr. Wellcome was in Minnesota, as I recollect it, and he was telegraphed to make his affidavit and sent it to us that it might be filed in time for the motion for a new trial; it was made and sent on and I believe was filed a day or two after the time had expired. I am not able to say who filed the affidavit. I know if it had been sent to me and received by me in time, I would have filed it in time.

Q. But you never received it yourself?

A. No, I think not.

Q. Have you or not read the bill of complaint in this case? A. Yes, sir; I have.

Q. What have you to say, if anything, in regard to the charges in the bill of complaint, in regard to conspiracy in so far as the attorneys or parties are concerned to enable Andrew J. Davis to win the bank stock case?

A. I am only able to say in regard to the attorneys, and so far as they are concerned I am satisfied that there was no conspiracy or anything that could be distorted into conspiracy of any kind.

Q. What in regard to the parties, if you know anything.

A. I don't know anything in regard to the parties, at all.

Q. If there was any such arrangement, would or would not you have been likely to have heard of it?

A. I should think we would have heard of it; yes, sir.

Q. State, Mr. Clayberg, whether or not you, so far as you know and your associate counsel in the bank stock case, did or did not use all the means and do all the work and take all the steps you could for the success of the plaintiff, your client, in that case?

A. We certainly did.

Q. Was there anything done or omitted to be done, so far as you know, that did not tend towards the end of achieving success?

A. No, sir; everything was done by the attorneys, so far as I know, for achieving the success of the suit. I know that Mr. Toole and myself put a great deal of time upon it and considered it and discussed it very frequently.

Q. What have you to say, if anything, in reference to the charges that the attorneys for the plaintiff in the bank stock case failed to sufficiently cross-examine the witness upon the part of the defendant, particularly those who testified as to the intention of Andrew J. Davis, deceased, to give the bank stock to Andrew J. Davis, Jr.?

A. I think they were all sufficiently cross-examined. We felt at that time that any further cross-examination would simply make their testimony stronger.

Q. Were or were not you or the other attorneys for the plaintiff in the bank stock case, so far as you know, ever told or informed of any material testimony in favor of the plaintiff in said case, which you omitted or failed to produce on the trial?

A. I think not. I think we produced all the testimony we could possibly get hold of at that time. I know that the Wehrspaus, both Mr. and Mrs. Wehrspaus

after Mr. Darnold had testified in the case, were approached by a party in our interest and he informed us that they knew nothing concerning the case at all either the gift or anything about Mr. Darnold.

Q. Is there anything further, Mr. Clayberg, in regard to this matter that you desire to state?

A. I do not think of anything further. I might state that the reason we did not introduce the books of James R. Boyce & Co. was because he told us that Mr. Darnold had made entries in the books after he had been discharged, and they would not, in my opinion, have added anything to Mr. Boyce's testimony, that he worked for them until the first of March.

JOHN B. CLAYBERG.

Subscribed and sworn to before me this 14th day of September, A. D. 1898.

[Seal]

HARRY HARRIS,

Notary Public in and for Lewis & Clarke County, Montana.

State of Montana,
County of Lewis and Clarke. } ss.

I, Harry Harris, a notary public in and for said Lewis and Clarke county, do hereby certify that the witness John B. Clayberg, in the foregoing deposition named, was by me duly sworn to testify the truth, the whole truth and nothing but the truth in said cause; that said deposition was taken at the time and place mentioned in the annexed notice, to wit, at my office, room 31 Bailey block, Main street, in the city of Helena, county of Lewis and Clarke, State of Montana, and on the 6th day of Septem-

ber, 1898, at the hour of 2 o'clock P. M. or that day; that said deposition was reduced to writing by me, and when completed was by the witness carefully read; and being by him corrected was by him subscribed in my presence.

I further certify that the reason for taking the foregoing deposition is, and the fact is, that the testimony of said witness is material and necessary for the defendant in the cause in caption of this deposition, made, and that the said witness contemplates going out of the District of Montana, in which district the said suit is to be tried; to a greater distance than 100 miles from the place of trial of said suit before the time of said trial.

I further certify that W. W. Dixon, Esq., appeared on behalf of the defendant and conducted the examination of the witness, and that there was no appearance on the part of the complainant.

I have retained the said deposition in my possession for the purpose of sealing up and directing the same with this certificate, of reasons aforesaid, for taking said deposition with my own hands to the Court for which the same was taken, and I do further certify that I am not counsel or attorney for either of the parties in said deposition in caption named, or in any way interested in the event of the said cause named in said caption.

In witness whereof, I have hereunto subscribed my name and affixed my seal of office this 14th day of September, A. D. 1898.

[Seal]

HARRY HARRIS,

Notary Public in and for Lewis and Clarke county, Montana.

Memorandum of Costs.

Deposition of John Clayberg, 60 folios at 20 cts.	
per folio.....	\$12.00
Oath, certificate, seal, etc.....	.50
	\$12.50

[Endorsed]: No. 58. In the Circuit Court of the United States for the District of Montana. Harriet Wood, Complainant, vs. Andrew J. Davis et al., defendants. Deposition of John B. Clayberg. Endorsed on envelope: Filed Sept. 15, 1898, and now filed and published Dec. 5, 1898. George W. Sproule, Clerk. By Charles W. Blair, Deputy Clerk.

In the Circuit Court of the United States, for the District of Montana.

IN EQUITY.

HARRIET WOOD,	}
Complainant,	
vs.	
ANDREW J. DAVIS et al.,	}
Defendants.	

Deposition of W. F. Sanders.

The complainant in the above-entitled suit and her attorneys are hereby notified that the defendants herein will take *de bene esse* the testimony of Wilber F. Sanders, who resides in Helena, State of Montana, for use at the

final hearing of said suit on behalf of the defendants, before Harry Harris, a notary public, within and for the county of Lewis & Clarke, State of Montana, and who is not of counsel or interested in said suit, at room No. 31, in the Bailey block, Main street, in the city of Helena, Lewis & Clarke county, Montana, on the 7th day of September, 1898, commencing at 2 o'clock P. M., on said day, and thereafter from day to day as the taking of said deposition may be adjourned, and such testimony will be so taken in accordance with sections 863, 864 and 865, U. S. R. S., and the equity rules.

Dated at Butte, Mont., Aug. 31, 1898.

(Signed) W. W. DIXON,
J. A. COTTER,
JOHN FORBIS,
WM. SCALLON,
Solicitors for Defendants.

To C. P. DRENNAN, Esq.,

Complainant's Solicitor, Main street, Butte, Mont.

State of Montana, }
County of Silver Bow. } ss.

J. K. Macdonald, being duly sworn, deposes and says that he is a citizen of the United States and over the age of twenty-one years; that on the 31st day of August, 1898, he served upon C. P. Drennan, Esq., solicitor for the complainant in the case of Harriet Wood, complainant, vs. Andrew J. Davis, Jr., et al., defendants, a notice of which the foregoing is a true copy. That such service was made by personally delivering to and leaving with the said C. P. Drennan, personally, the original of said notice at his

office on North Main street, Butte, Montana. And affiant further deposes and says that he is in nowise interested in said action.

J. K. MacDONALD.

Subscribed and sworn to before me this 5th day of September, 1898.

CHAS. F. ROE,

Notary Public in and for the County of Silver Bow, State of Montana.

In the Circuit Court of the United States, for the District of Montana.

IN EQUITY.

HARRIET WOOD,

Complainant,

vs.

ANDREW J. DAVIS et al.,

Defendants.

No. 58.

Be it remembered, that pursuant to the notice hereunto annexed and on the 7th day of September, in the year of our Lord one thousand eight hundred and ninety-eight, at my office, room 31, Bailey block, in the city of Helena, county of Lewis & Clarke, and State of Montana, at the hour of 2 o'clock P. M., before me, Harry Harris, a notary public in and for said county of Lewis & Clarke, duly appointed and commissioned to administer oaths, personally appeared Wilbur F. Sanders, of lawful age, who being by me first duly sworn and cautioned to tes-

tify the truth, the whole truth, and nothing but the truth, touching the matters in controversy in the above-entitled action, was then and there examined and interrogated by W. W. Dixon, Esq., one of the solicitors for the defendants, the complainant not being represented by counsel, and thereupon said witness did depose, testify, and say as appears in his answer to the interrogatories following, to wit:

Direct Examination.

(By W. W. DIXON.)

Q. What is your name and where do you reside?

A. My name is Wilbur F. Sanders; I reside at Helena, Montana; I am an attorney and counselor at law.

Q. How long have you resided at Montana?

A. I have been in Montana a resident thirty-five years, lacking possibly ten days.

Q. How long have you been engaged in the practice of law in Montana?

A. Thirty-four years and ten or eleven months.

Q. How actively have you been engaged in the practice of the law during that time, and in what courts?

A. With the exception of three and one-half years, while I was absent in Washington City, I have been continuously actively engaged practicing law in the Supreme Court of Montana, District and Probate Courts of Montana, before the justices of the peace, and in the Supreme, Circuit, and District Courts of the United States.

Q. Have you been absent from Montana during any part of this last summer? If so, state when and how long and where you were.

A. I was absent from Montana from the 28th day of May to some time in August—the exact date I cannot give—in the city of New York.

Q. Were you ill during the time, or what was the cause of your absence from the State in a general way?

A. I had a trouble, ulcer or something upon my face, and I went there to have it surgically treated; otherwise I was not ill.

Q. Was or was not that the cause of your absence?

A. That was my sole reason for going to New York, and I came back as soon as I could do so with propriety on account of that difficulty

Q. Do you expect to leave the State of Montana at any time shortly?

A. Not to be gone long, and possibly I shall not go this year, although I may be called away in the course of a month or two.

Q. If you are called away where should you expect to go? A. To New York.

Q. Please state what official positions, if any, you have held in Montana.

A. I have been a member of the House of Representatives for five terms, I think. I was a Senator from Montana in the United States senate, in 1890, 1891, 1892 and a part of 1893.

Q. Are you acquainted or have you been connected as attorney or counsel with litigation relating to and growing out of the estate of Andrew J. Davis, who died in Silver Bow county, Montana, in 1890?

A. I am acquainted with that litigation and have been connected with two phases of it.

Q. When were you first connected with it?

A. My recollection is, I was first connected with it in the contest for the probate of the will in '91 and '92. I think I was connected with that litigation as one of the counsel for the proponent of the will Mr. John A. Davis.

Q. Was that your first connection with the case?

A. It was.

Q. What subsequent connection did you have with it?

A. I was employed and engaged in the prosecution of the suit of James A. Talbott, special administrator, to recover for the estate the shares of stock of the First National Bank of Butte, from Andrew J. Davis, who claimed them as his own property; there were associated with me in that transaction, my partner, Messrs. Toole and Wallace and McConnell, Clayberg & Gunn, but only Mr. E. W. Toole, John B. Clayberg, Esq., and myself were actively engaged in the trial of the case.

Q. By whom were you employed as counsel in that case?

A. By the special administrator, Mr. James A. Talbott.

Q. Who paid your fees as counsel?

A. I think Mr. J. H. Leyson, the administrator, succeeding in the administration of the estate of Mr. Talbott.

Q. Did you assist in the trial of the case in the District Court? A. I did.

Q. And in the Supreme Court?

A. I did, possibly in the Supreme Court my assistance was in advising with my colleagues and assisting in preparing the brief, as I think I did not argue it in the court myself.

Q. Were you not connected as counsel in the proceedings in the District Court of Silver Bow county in 1890 in the matter of the application of John A. Davis to be appointed administrator of the estate of Andrew J. Davis, deceased, and the opposition thereto.

A. I was not so employed.

Q. When you were employed by Mr. Talbott as counsel in the case referred to above, and commonly called the bank stock case, what instructions or directions did he give you at that time or afterwards in regard to the conduct of the case, if any?

A. At the time he employed me, he stated to me that the case was one of great importance, and that he wished me to do everything which he could properly do to have the estate recover everything that belonged to it, and he stated to me that the other gentleman had been employed and he wished me to assist them. He said then, or at a subsequent interview, that the case was one of great delicacy or difficulty owing to certain events which had transpired in his presence touching the shares of bank stock in controversy, and for that reason he wished the estate to be well or ably represented. I can't say which phrase he used.

Q. Was your employment as counsel before or after the commencement of the bank stock suit?

A. I think it was before, but I am not certain.

Q. Did not Mr. Talbott state to you that you were employed with Mr. Toole and Mr. Clayberg in the case?

A. He did.

Q. Did you or not, after your employment, have further talk or consultation with Mr. Talbott about the case?

A. I did. Before the trial I was in Butte, and wishing to know the precise facts I went with him into the back room of the First National Bank and closed the door and had a consultation with him, lasting an hour or two, in which I cross-examined him as thoroughly as possible as to what he knew touching the transfer or gift of the shares of stock by Andrew J. Davis, senior, in his lifetime to Andrew J. Davis, Jr., and he told me the circumstances. He said that Andy, by which name the younger Davis was usually known, knew that he was cognizant of the facts, and he presumed he would be called upon by him to testify to them, and I inquired as to what he knew; what, if he were put upon the witness stand, he would swear to and also as to who else was present, if anyone, when the circumstances related transpired. I had other consultations or conversations with him on this subject matter, but on the occasion that I have described I sought to get at the bottom facts of which he was cognizant, on the subject.

Q. State whether or not either Mr. Talbott or Mr. Leyson at any time told you or intimated to you that they or either of them desired to do anything, or to have you do anything whatever, that would favor Andrew J. Davis, Jr.'s, claim to the bank stock in this litigation.

A. They never did, nor did either of them.

Q. Do you know Mr. James R. Boyce, Jr.?

A. I do.

Q. Was he a witness on the trial of the bank stock case in the District Court? A. He was.

Q. For whom?

A. For the estate, for the complainant, the special administrator.

Q. Do you know whether or not he also made an affidavit afterwards that was used on the motion for a new trial in the bank stock case? A. He did.

Q. Have you read Mr. Boyce's testimony given in this suit, or the transcript of it?

A. I have read most of it, not all of it.

Q. State what you know, if anything in regard to the books of James R. Boyce & Co., which Mr. James R. Boyce, Jr., mentioned in his evidence as showing the date when William C. Darnold left his employ. State what, if anything, you have to say in regard to Mr. Boyce's testimony in this suit, relating to those books.

A. I can't say that I ever saw the books of J. R. Boyce, Jr., Co. mentioned. I remember the question as to when Mr. Darnold left the employ of J. R. Boyce, Jr., & Co. came up, but whether on the trial or on the motion for a new trial I do not remember clearly. My recollection is it appeared from some testimony that entries were made by Darnold in the Boyce books after he has ceased to be in their employ. He frequented their place of business and being familiar with it, continued to do some work on the books.

Q. State if you remember whether or not these books of J. R. Boyce, Jr., were produced upon the trial of the bank stock case in the District Court, or were referred to in Mr. Boyce's affidavit on motion for a new trial, and if they were not, if you remember the reason why they were not.

A. My recollection is that the books were not produced on the trial, and that at the time of the trial we did

not know that they contained any testimony bearing upon any controversy arising during the trial, and that if they contained anything which was of value as elucidating the facts in the trial of the case, direct or collateral, it was ascertained after the trial had closed.

Q. State if you remember how the testimony of James R. Boyce, Jr., given upon the witness stand in the bank stock case, compared with the statements he had made to yourself and other counsel before as to what he would testify to.

A. In detail, I cannot restate and contrast that which he said to us in consultations with him during the recess of the Court at the trial, and that he testified to upon the witness stand, but this I know, that his statements to us of facts which he said he knew caused the expectation that he would testify to them on the witness stand, and when he placed him upon the witness stand and examined him, he did not justify the expectations which his statements to us had caused, and upon his examination in chief and his cross-examination he did not maintain the facts which we had been led to expect that he would from conversations had with him before he went on the stand.

Q. Were you or not present when the affidavit of James R. Boyce, Jr., was taken on the motion for a new trial in the bank stock case?

A. I am not prepared to say that I was. I think perhaps I may have been; that has escaped definitely my memory. I either was present when it was taken, or saw it shortly after.

Q. State, if you can, whether or not this affidavit of

James R. Boyce, Jr., on motion for a new trial in the bank stock case did or did not include everything that he has informed you of, and which you thought material to the case at the time the affidavit was filed.

A. It did; nothing was omitted from it which we deemed material which he stated at that time that he then knew.

Q. Before or at the time of the trial of the bank stock case in the District Court, did you or not see and examine what purported to be a copy from the official transcript of the testimony of Andrew J. Davis, Jr., which had been given in 1890 in the contest over the appointment of an administrator of the Andrew J. Davis estate, and which related to what occurred at the time of the gift of the bank stock which Andrew J. Davis, Jr., claimed?

A. Yes.

Q. Did you or not also see what purported to be a transcript of the testimony of James A. Talbott given in the same matter? A. Yes.

Q. Was or was not the testimony of James A. Talbott in that matter introduced in evidence in the bank stock case or put before the Court? A. Yes.

Q. Was or was not the transcript of the testimony in relation to the gift of the bank stock to Andrew J. Davis as given by him on the contest for the appointment of an administrator introduced or put in evidence on the former trial of the bank stock case, in the District Court?

A. It was not.

Q. State, if you know, why this last mentioned testimony was not put in evidence in the bank stock case?

A. Mr. Toole, Mr. Clayberg and myself consulted as to the wisdom of introducing that as the statement of An-

drew J. Davis, Jr., we agreed that it was competent testimony, but we were of the further opinion that it was likely to be decided that he could explain those statements orally upon the witness stand if we introduced them, whereas if we did not, introduce them, he was an incompetent witness, and that there was likely to be more harm come from their introduction to the case we were trying than by omitting them, and we decided that we would not introduce them.

Q. State, if you remember, whether or not Andrew J. Davis, Jr., was offered as a witness in the bank stock case in his own behalf.

A. He was; we objected to his competency and our objection was sustained, and he did not testify.

Q. So far as you know, did or did not Mr. Talbott ever request you or any of the other counsel not to introduce on the trial of the bank stock case the testimony which had been previously given by Andrew J. Davis, Jr., or did he or not, so far as you know, at any time, give you or any of the counsel any directions or instructions in regard to that testimony?

A. Mr. Talbott never to me or in my presence made any request or intimated that he did not desire that the entire testimony that we thought competent and useful be introduced, aside from the expression of a general desire that we should try the case the best we knew how. I do not think he gave us any directions. The merits of the case were in a nutshell, and involved what transpired in less than half an hour at the residence of A. J. Davis Sr., and while some other matters arose collaterally, the circumstances occurring at that time were the crucial facts of the case.

Q. Did you ever see a certain affidavit purported to have been made by one W. C. Darnold, in the matter of the bank stock case, during the pendency of the motion for a new trial in that case? A. I think I saw it.

Q. Did you know Mr. Darnold, personally?

A. I did. I have known him for twenty or twenty-five years, I should think.

Q. Please state all that you know of your own knowledge in regard to this Darnold affidavit, and what became of it, and whether or not it was used upon the motion for a new trial of the bank stock case, and if not so used why it was not used?

A. I don't know so much about that affidavit as I am advised my colleagues do. It was taken in my absence and without my knowledge, and after it was taken, it was shown to me. It was stated that it had been obtained from Mr. Darnold, upon condition that it should not be used unless there was secured to him some personal immunity from criminal prosecution, and that the word of one of our colleagues in the case had been given to Mr. Darnold to that effect, and inasmuch as it was not in our power to secure that immunity to him, and inasmuch as we had in other affidavits the fact established that he has made the same statements orally that were contained in this affidavit, it was concluded best not to introduce it. I think I ought to say another motive actuated me possibly my colleagues. Mr. Darnold's appearance upon the witness stand on the trial of the case was very much against him to those of us who had known him for some time, and as well as I did, and his affidavit did not create any surprise in me, and I did not think Judge McHatton

without his affidavit, would give much credence to his story.

Q. Do you remember being present in Corbett & Welcome's office when Mr. Boyce produced this affidavit of Darnold referred to above a few days after it had been taken in Helena?

A. I do remember to have been present when Mr. Boyce produced that affidavit. I think I was in the office while the affidavit was there and Mr. Boyce, and it was the subject matter of consideration by us, but I do not remember that Mr. Boyce produced the affidavit while I was there. I think it had already been produced and was in the possession of some of the lawyers or on the table, even that memory is somewhat vague.

Q. Have you read Mr. Frank E. Corbett's testimony in this suit as contained in the transcript of the evidence?

A. I have run my eye over it. I have not read it all.

Q. What do you know, if anything, in regard to what Mr. Corbett testifies to as to Mr. Clayberg making a remark to the effect that you did not know how you could introduce the evidence of Andrew J. Davis, Jr., in the bank stock case if your client would not let you?

A. There never was such a remark made in my presence by Mr. Clayberg or anybody else. Such a remark would have startled me because it was so contrary to all our relations with Mr. Talbott, and I am certain it would have induced me and, I am satisfied, the other counsel, to have taken steps to emancipate ourselves from any limitation of that kind.

Q. Did or did not you or your associate counsel in the bank stock case, so far as you know, or have any informa-

tion of any material testimony on the part of the plaintiff in the bank stock case which you did not introduce upon the trial of that case?

A. Speaking for myself, every item of testimony was introduced within my knowledge that I deemed material and helpful to the estate, and no circumstance occurred during the trial which lasted a week, or so inducing a belief that my colleagues omitted anything. It will sometimes occur during the progress of a trial that the trial itself will reveal testimony not foreseen which can be obtained, but my recollection of this case is that nothing of material importance was so revealed during the trial. I do remember, during the period permitted for the motion for a new trial, that we sought to get the affidavit of Mr. John B. Welcome, who was at Virginia, Madison county, Montana, if I remember right, and was daily expected to return, and when the time was limited he was telegraphed for, but I think he did not get back within the time limited and we lost his affidavit thereby. I want to say this about the whole matter; my employment was more particularly for the trial of this case. I did not prepare the pleadings or write the motion for a new trial or bill of exceptions; as to some of these, I was consulted and gave my advice, but the details of those matters were more particularly in the hands of my colleagues.

Q. Upon the motion for a new trial of the bank stock case, did you know of any matter material or any evidence material upon that motion that was not included in the affidavits which you submitted upon the motion?

A. Nothing except the Darnold affidavit; that we did not submit. The dividing line between the things ma-

terial and immaterial, useful and harmful, to be put into a motion for a new trial is one which every lawyer must judge for himself. A motion for a new trial can be materially weakened by putting in matters of no consequence. We put in everything that we deemed would assist us in reversing that judgment; getting a new trial.

Q. In your experience as a lawyer, is it or not frequently a close and serious question with counsel as to whether or not certain evidence had better be offered or left out with a view to the success of your client in the case?

A. It is; every lawyer has to determine that from his view of the materiality of the evidence and its probable influence upon the Court.

Q. State if you remember anything in relation to the examination of the witnesses for the defendant upon the trial of the bank stock case, who testified in regard to the declarations of Andrew J. Davis, that he intended to give Andy the bank, and whether or not the cross-examination of such witnesses was as close and extended as counsel thought advisable for the interest of their clients.

A. I think the cross-examination of the witnesses was as elaborate and close as was useful. It was conducted largely by Mr. Toole and Mr. Clayberg. The general standing and character of most of the witnesses was such that it was idle to cross-examine them with any view to show falsehood, and all that could be done was to get out the entire facts to see if there was any qualification to the statement to which they testified. This was true of most of the witnesses introduced by the defendant.

Q. Do you remember the testimony of Judge Knowles,

given for the defendants upon the trial of the bank stock case? A. In a general way; yes.

Q. Can you state anything in regard to whether or not counsel for plaintiff consulted as to the advisability of objecting to Judge Knowles testimony, or a portion of it, on the ground that it was a confidential communication between a client and attorney?

A. I remember there was such consultation.

Q. And what was the conclusion counsel came to in regard to it, if you remember?

A. Speaking for myself, I think I concluded that such communications might be objected to by the client, but that if they became materials in controversies thereafter between other parties that the objection being a personal one would not hold, but we did not think Judge Knowles would betray any confidence which by law or in honor he felt himself bound to maintain. I did not consider really that there was any confidence betrayed by Judge Knowles in telling this matter, and some portions of his testimony we did consider favorable to us, in fact, all through the case we maintained that the circumstances proved did not constitute a complete gift causa mortis—we agreed on that. I think I may say, as far as one man can testify to the belief of another, we all believed that and we fought it through two courts on that proposition.

Q. State whether or not, in your opinion as a lawyer, the bank stock case was what you would call a closely and hotly contested case on the part of the plaintiff.

A. It was. We used every instrumentality to win it that was at our command, and never were in any way obstructed.

Q. Do you know of anything that was done or omitted to be done in that case to enable the plaintiff to be successful in it either by the counsel in that case or by anyone connected with it?

A. I do not. It frequently occurs in my experience that I could try a case the second time a little better.

Q. Have you read the allegations in the bill in this suit referring to the charges of conspiracy and collusion? And if you have, please state fully anything you may desire to state in relation to said charges, as to their truth or falsehood.

A. I have read the bill. Speaking for myself, the charges are wholly false. Speaking for the two gentlemen who assisted me in the trial of the case, no event occurred and nothing was omitted to excite a suspicion in my mind that there is any truth in those allegations.

Q. Have you any knowledge of any conspiracy or collusion upon the part of the defendants in this cause or any of them for the purpose of enabling Andrew J. Davis, Jr., to be successful in the bank stock case? Please state what you know.

A. I have no such knowledge.

Q. Do you know any other matter or thing relevant to this case, or any part of it? If so, please state it.

A. I do not think of anything else that would be helpful to any party to this case.

W. F. SANDERS.

Subscribed and sworn to before me this thirteenth day of September, A. D. 1898.

[Seal]

HARRY HARRIS,

Notary Public in and for Lewis & Clarke County, Montana.

State of Montana,
 County of Lewis and Clarke. } ss.

I, Harry Harris, a notary public in and for said Lewis and Clarke county, do hereby certify that the witness, Wilber F. Sanders, in the foregoing deposition named, was by me duly sworn to testify the truth, the whole truth and nothing but the truth, in said cause; that said deposition was taken at the time and place mentioned in the annexed notice, to wit, at my office, room 31, Bailey block, Main street, in the city of Helena, county of Lewis and Clarke, and State of Montana, and on the seventh day of September, 1898, at the hour of 2 o'clock P. M. of that day; that said deposition was reduced to writing by me, and when completed was by the witness carefully read, and being by him corrected, was by him subscribed in my presence.

I further certify that the reason for taking the foregoing deposition is, and the fact is, that the testimony of said witness is material and necessary for the defendants in the cause in caption of said deposition named, and that the said witness contemplates going out of the District of Montana, in which district the said suit is to be tried, to a greater distance than one hundred miles from the place of trial of said suit, before the time of said trial.

I further certify that W. W. Dixon, Esq., appeared on behalf of the defendants and conducted the examination of the witness, and that there was no appearances on the part of the complainant.

I have retained the said deposition in my possession for the purpose of sealing up and directing the same, with

this certificate of reason aforesaid, for taking said deposition with my own hands to the Court for which the same was taken, and I do further certify that I am not counsel or attorney for either of the parties in said deposition in caption named, or in any way interested in the event of the said cause named in said caption.

In witness whereof I have hereunto subscribed my name and affixed my seal of office this fourteenth day of September, A. D. 1898.

[Seal] HARRY HARRIS,
Notary Public for Lewis and Clarke County, Montana.

Memorandum of Costs.

Deposition of Wilber F. Sanders, 45 fols., at 20c. per	
folio	\$9.00
Oath certificate, seal, etc.....	.50
	<hr style="width: 10%; margin-left: auto; margin-right: 0;"/>
Total	\$9.50

In the Circuit Court of the United States, for the District of Montana. Harriet Wood, Complainant, vs. Andrew J. Davis et al., Defendants. Deposition of Wilber F. Sanders. Endorsed on envelope. Filed Sept. 15, 1898; filed and published Dec. 5, 1898. Geo. W. Sproule, Clerk. By Charles W. Blair, Dep. Clerk.

United States Circuit Court, District of Montana.

IN EQUITY.

HARRIET WOOD,

Complainant,

against

ANDREW J. DAVIS, Jr., THE FIRST NATIONAL BANK OF BUTTE, MONTANA, JAMES A. TALBOTT, Formerly Special Administrator of the Estate of Andrew J. Davis, Deceased, JOHN H. LEYSON, as Administrator with the Will Annexed of Andrew J. Davis, Deceased, and JOHN E. DAVIS, as Administrator of the Estate of John A. Davis, Deceased.

Defendants.

Deposition of Harriet Wood.

Sirs: Please to take notice that the deposition de bene esse of Harriet Wood, the complainant herein, of Springfield, Massachusetts, who resides more than one hundred miles from the city of Butte, Montana, where the court at which the above-entitled cause will be tried, is to be held, will be taken to be read in evidence at the trial of the said cause on the part of the complainant, before Dexter E. Tilley, a notary public, at his office, 455 Maine street, in the city of Springfield, Massachusetts, on Saturday, the 23d day of July, 1898, at eleven o'clock in the forenoon of that day, at which time and place you are hereby notified to be present and put interrogatories to the said

witness if you shall think fit; and take further notice that the examination of said witness will be adjourned from time to time, is necessary, until said deposition is taken.

Dated, Butte, Montana, July 9, 1898.

Yours, etc.

W. S. LOGAN and

C. P. DRENNAN.

Solicitors for Complainant.

To W. W. DIXON, JOHN F. FORBIS, and JAMES W. FORBIS, Solicitors for Andrew J. Davis, Jr., and the First National Bank of Butte.

To J. W. COTTER and WILLIAM SCALLON, Solicitors for Defendant John H. Leyson, as Administrator.

To WILLIAM SCALLON, Solicitor for Defendant James A. Talbott.

To E. W. HARWOOD, Solicitor for Defendant John E. Davis, as Administrator.

Due and timely service of a copy of the foregoing notice is hereby submitted this 11th day of July, 1898.

W. W. DIXON and

FORBIS & FORBIS,

Solicitors for Defendant Andrew J. Davis, Jr., and the First National Bank of Butte.

J. W. COTTER and

WM. SCALLON,

Solicitors for Defendant John H. Leyson, as Administrator.

WM. SCALLON,

Solicitor for Defendant James A. Talbott.

E. N. HARWOOD,

Solicitor for Defendant John E. Davis, as Administrator.

United States Circuit Court, District of Montana. Harriet Wood, vs. Andrew J. Davis, Jr., et al. Notice of taking deposition De Bene Esse. W. S. Logan and C. P. Drennen, Solicitors for Complainant.

United States of America, }
 District of Massachusetts, } ss.
 State of Massachusetts, }
 County of Hampden. }

Be it remembered, that on this twenty-third day of July, in the year of our Lord one thousand eight hundred and ninety-eight, I, Dexter E. Tilley, notary public within and for said county, did call and cause to be and personally appear before me at my office, 455 Main street, in said Springfield, in said District of Massachusetts, in the State aforesaid, Harriet Wood, to testify and the truth to say on the part and behalf of the complainant in a certain suit or matter of controversy now pending and undetermined in the Circuit Court of the United States for the District of Montana, at Butte, County of Silver Bow, State of Montana, in the district aforesaid, wherein said Harriet Wood is complainant and Andrew J. Davis, Jr., of the First National Bank of Butte, Montana, James A. Talbott, formerly special administrator of the estate of Andrew J. Davis, deceased, John H. Leyson, as administrator with the will annexed of Andrew J. Davis, deceased, and John E. Davis, as administrator of the estate of John A. Davis, deceased, are defendants, And said Harriet Wood being about the age of eighty-two years, and having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing

but the truth in the matter of controversy aforesaid, I did carefully examine the said Harriet Wood, and she did thereupon depose, testify and say as follows:

Pursuant to the annexed notice the parties met at my office July 23d, at eleven o'clock in the morning. There appeared: Logan, Demond & Harby, represented by H. H. Kellogg, for complainant. Horace G. Allen, for A. J. Davis and John H. Leyson.

By consent of counsel, because of the illness of Mrs. Wood, the hearing was adjourned to 427 Union street, in said Springfield, the residence of Mrs. Wood.

TESTIMONY OF MRS. HARRIET WOOD.

(By MR. KELLOGG.)

Q. 1. What is your name, your age and your residence, Mrs. Wood?

A. Harriet Wood; I am eighty-two years old, and Springfield.

Q. 2. Where have you lived for the past eight years.

A. In Springfield.

Q. 3. What has been the condition of your health during the past eight years, Mrs. Wood?

A. It has been very poor. I have not been able to get out much of any.

Q. 4. Are you the complainant in the suit now pending in the Circuit Court of the United States for the District of Montana, which is entitled, "Harriet Wood, complainant, vs. Andrew J. Davis, Jr., the First National Bank of Butte, Montana, James A. Talbott, formerly special administrator of the estate of Andrew J. Davis,

deceased, John H. Leyson, as administrator with the will annexed of Andrew J. Davis, deceased, and John E. Davis as administrator of the estate of John A. Davis, deceased, defendants? A. Yes, sir.

Q. 5. Were you a party to the suit brought by James A. Talbott, as special administrator of the estate of Andrew J. Davis, deceased, about the year 1893 in the District Court of Montana, for the purpose of recovering nine hundred and fifty shares of the defendant bank stock claimed by Andrew J. Davis—were you a party to that suit? A. No.

Q. 6. Did you have anything to do with the suit?

A. No. Do I understand you?

(Mr. KELLOGG.) I think so.

Q. 7. Did you have any control over the suit?

(Objected to in form and substance.)

A. No.

Q. 8. When did you first know, Mrs, Wood, of the frauds set forth in the bill of complaint which you have filed in this suit in Montana, and which, it is there alleged, were consummated, and by means of which important evidence was suppressed; when did you first hear of those frauds?

A. It was in the last of September or first of October, I think it was.

Q. 9. Of what year?

A. It was two years ago.

Q. 10. So it was 1896?

A. Yes, sir; about the time we moved up here.

Q. 11. How did you learn of those frauds which you say you heard of in September or October of 1896, and which are alleged in the bill of complaint?

(Objected to in form and substance.)

A. First by the papers, and then our lawyer you know, come.

Q. 12. Who was your lawyer?

A. Why, my lawyer—why his name is gone.

Q. 13. Was it Mr. Logan?

A. Yes; his name was gone. He sat right here and he told about it and I told him I was very much distressed because I was afraid they would get in jail.

(Answer objected to as not responsive.)

Q. 14. Did Mr. Logan call on you at this house?

A. Yes; he sat in this chair and I sat in that chair (showing), when he was here.

Q. 15. Did you know anything about these frauds before the time which you speak of when Mr. Logan communicated them to you in September or October of 1896?

A. Well, you know, I said by papers, and then he came.

Cross-Examination.

(By Mr. ALLEN.)

X. Q. 16. How soon after the death of your brother, Andrew J. Davis, did you hear of his death?

A. Very soon.

X. Q. 17. Probably within a month? A. Yes.

X. Q. 18. At that time you knew that if he died without a will you were one of his heirs at law?

(Objected to in form and substance.)

A. Yes, sir.

X. Q. 19. And if he had left no will and no widow or children, do you remember what share you would have had in his estate?

(Objected to in form and substance.)

A. I don't know how much it was.

X. Q. 20. But it would be an eleventh part?

A. Yes, sir.

X. Q. 21. You didn't go to Montana yourself, Mrs. Wood, did you? A. No.

X. Q. 22. How long was it before you had employed some one, or entered into an agreement with some one to look after your interests in the estate of your brother?

A. It was soon after the death of my brother.

X. Q. 23. Whom did you first appoint your attorney to look after your interests in the estate?

A. It was my brother, Erwin.

X. Q. 24. Was that very soon after your brother Andrew J. died that you appointed your brother Erwin your attorney to look after your interests in the estate, and made agreements with him? A. Yes, sir.

X. Q. 25. And are those agreements still in force?

(Objected to as irrelevant and in form and substance.)

A. I don't know as I understand you right. I hain't changed them.

X. Q. 26. You say you have not changed them; you did not mean that you have canceled them or anything of that kind? Those agreements with Erwin?

A. I don't know as I understand you. We appointed him and he has been going on with it.

X. Q. 27. You never have canceled his authority, nor revoked it?

A. No; I don't know as I really understand you.

X. Q. 28. How soon after giving the power of attorney and making the agreements with Erwin did you begin to hear from him in reference to this estate?

A. I don't know as I understand you.

X. Q. 29. Did you see Erwin after that? And if so, how many times?

(Objected to as irrelevant.)

A. Yes; I think I did.

X. Q. 30. Did you see him here or in New York?

A. No; he would come on.

X. Q. 31. And you always saw him here?

A. Yes, sir.

X. Q. 32. About how many times have you seen him since the power of attorney and agreement was made?

A. I do not know as I can tell.

X. Q. 33. Give us your best recollection about it. Was it once a month?

A. He didn't come so often as once a month; he didn't come very often to see me.

X. Q. 34. It was about how many times, or how often, in your recollection—how many times a year, probably?

A. I don't think he come as often as once a year.

(Question objected to unless it pertains to some particular year. Asking how many times a year is entirely incompetent.)

X. Q. 35. About how often did he come a year?

A. If he come—I couldn't tell.

X. Q. 36. Don't you think you have seen him every year?

A. I think some years; I didn't see him once a year.

X. Q. 37. How many times did you see him?

(Objected to in form and substance.)

A. He didn't come very often.

X. Q. 38. Give me your best recollection as to how often—three or four times a year? Once a year?

A. I don't know. He come once—I couldn't tell.

X. Q. 39. You remember, Mrs. Wood, that from the time that Erwin was appointed your agent and attorney you have frequently heard from him about the estate; haven't you? A. Oh, yes.

X. Q. 40. About how often during that time should you say you had received letters about the estate?

A. I don't know as I understand you, but when he had any news he would write to us.

X. Q. 41. Can you tell about how often he used to write to you? A. I don't know as I could.

X. Q. 42. Can you tell me about how frequently you heard from Erwin Davis from the time he was appointed your attorney?

A. I don't know if this is any connection to the answer, but Mr. Wood was living—my husband—so he sent me money—Davis did—to support him—to help us.

X. Q. 43. I want to know about how often he wrote you letters about the estate, Mrs. Wood, after he was appointed your attorney.

(Objected to in form and substance.)

A. He didn't write unless he had some news to tell me.

X. Q. 44. You learned from Erwin Davis the fact that an alleged will had been discovered, didn't you, of your brother Andrew's?

A. I think it was through—it come out in the paper.

X. Q. 45. I want to ask you if you heard of the finding of an alleged will through Erwin Davis.

A. I think it was in the paper.

X. Q. 46. Did he communicate with you on the sub-

ject at all? About the finding of a will, or the existence of it?

A. I don't know as he—I don't know as I would really tell decidedly.

X. Q. 47. How long ago did you first employ or know of the employment for you of lawyers in connection with your interest in the estate of Andrew J. Davis?

A. I don't know as I understand you, but Erwin done it. Erwin employed the lawyer and I left it in his hands. I don't know as I understand you.

(Objected to.)

X. Q. 48. Now, I understand from you, then, that the first attorney that was employed on your behalf, so far as you know, was employed by Mr. Erwin Davis, your brother?

(Objected to. It implies that the witness has made an answer that she did not make.)

A. Yes.

X. Q. 49. And that also, as you understand it, was Mr. Logan, or Mr. Logan's firm in New York; was not it?

A. I don't know as I know of his employing any other lawyer.

X. Q. 50. Mr. Logan, you referred to? A. Yes.

X. Q. 51. Who has been spoken of here?

A. Yes

X. Q. 52. When, for the first time, did you know that Mr. Erwin Davis had employed counsel in the persons of Mr. Logan, or his firm? I don't mean exactly the day, but about how long, or how soon after you appointed Mr. Erwin Davis your attorney?

A. I don't know as I can really tell for certain.

X. Q. 53. I don't suppose you can tell to the day, but was it soon after the appointment of Erwin as your attorney that you heard of his employing Mr. Logan?

(Objected to.)

A. I don't know as I could tell.

X. Q. 54. How long have you known Mr. Logan as a lawyer in your interests—how many years? About how many years?

A. I don't know as I could tell for certain how many years.

X. Q. 55. Was not it soon after Mr. Erwin Davis was appointed that Mr. Logan was retained or first heard of by you as your attorney?

A. I think so, but I don't know as I could say for certain.

(Question objected to in form and substance.)

X. Q. 56. You have had information that Mr. Logan was acting in your interests for some years in the Davis estate, haven't you? You have known him as your attorney for some years?

A. I do not know as I understand you, but I think as much as three or four years.

X. Q. 57. Now, has not he been your attorney for much longer than that?

(Objected to on same ground.)

A. Well, I couldn't tell.

X. Q. 58. You won't say that Mr. Logan has not been your counsel for six or seven years, will you?

A. No, I cannot remember.

X. Q. 59. Did you hear from Mr. Logan after he was employed in your behalf in reference to this estate from time to time?

A. I don't know as I understand you, but I left it in his hands and the lawyer didn't have anything to do with it.

X. Q. 60. You left it in his hands—you mean Erwin's hands?

A. Yes, I did in the first place, so Erwin went on as he thought best.

X. Q. 61. Now, my question was, after you knew that Mr. Logan or his office were retained for you, whether they communicated with you on such matters about the estate, either by letter or orally.

A. I left it in Erwin's hands. They didn't communicate to me, you know, because—I don't know as I understand you.

X. Q. 62. Then, if I understand you, Mrs. Wood, you didn't hear anything from Logan or his office about this estate; is that so?

(Question objected to as too general. It should be limited.)

A. I don't know as I understand you. Erwin done the business, you know, and then if he had any news he would write.

X. Q. 63. You must understand this: Did Mr. Logan, or anyone for him, in his office, write letters to you about the estate?

A. I don't remember.

X. Q. 64. Did Mr. Logan, or anyone for him, see you in reference to the estate or your interests under it, since he got through with Erwin?

A. I don't know as that is right. Yes, Mr. Logan has called since.

X. Q. 65. How many times has Mr. Logan called on you, or have you seen him personally.

A. I don't think I could tell.

X. Q. 66. Have you seen other people from his office, or connected with him in business, connected with this matter?

(Objected to as irrelevant.)

A. A lady called that worked for him a few weeks ago.

X. Q. 67. Had you ever seen Mr. Logan before the time when he called which you have spoken of two years ago in September? A. I don't recollect I had.

X. Q. 68. Can you remember any of the allegations or charges of fraud that are made in this bill in equity?

A. They are on paper, hain't they?

X. Q. 69. Yes; can you remember them?

A. What date? No.

X. Q. 70. Whether you can tell me what these charges of fraud are which you have said you knew nothing about until two years ago this September? They are set forth in the bill, and I want to know if you can tell me what they are? A. I don't know as I understand you.

X. Q. 71. On direct testimony you were asked the question in substance, when you first heard of the charges of fraud set forth in your bill in equity. Now, I want you to tell me what those charges of fraud are, if you can.

A. Do you mean them that was false against the estate?

X. Q. 72. Every charge of fraud that you can remember that is in your bill in equity?

A. I don't know as I can understand you.

Redirect Examination.

(By Mr. KELLOGG.)

R. D. Q. 73. How many agreements did you ever have with Erwin Davis—did you ever sign?

(Question objected to.)

R. D. Q. 74. The counsel for the defendants—you told him in cross-examination about certain agreements. Did you ever sign more than one agreement with Erwin Davis?

A. No, if I understand you right; I never did.

R. D. Q. 75. Was that before or after the will was discovered, Mrs. Wood, that you signed this agreement with Erwin? A. I think it was before.

R. D. Q. 76. Was there not a long period of time, perhaps some years, that you didn't hear from directly, or see your brother Erwin Davis?

(Objected to in form and substance, and as incompetent and irrelevant.)

A. I think it was not very often. I don't know as I—

R. D. Q. 77. Did you hear of any of these frauds before the fall of 1896, when you were told by Mr. Logan, as you have stated?

(Objected to as incompetent as to form and substance, and as improper upon redirect examination.)

A. I think not.

R. D. Q. 78. You don't think you saw Mr. Logan, you say, prior to three years ago?

(Objected to in form and substance.)

R. D. Q. 79. You first saw him three years ago?

A. Yes; he told us about it, after we read it in the paper.

(Question objected to as incompetent, leading, and irrelevant.)

R. D. Q. 80. How long has it been since Erwin Davis did anything for you as agent or attorney, Mrs. Wood?

(Objected to as incompetent.)

A. I couldn't tell. Mr. Logan—

R. D. Q. 81. Do you remember how long?

A. It is sometime, I guess; I can't tell how long. Well, I don't think I could tell how long.

Q. 82. Don't you remember some of these frauds, Mrs. Wood, that are alleged in your bill of complaint?

(Objected to as incompetent upon redirect examination.)

A. I don't know as I understand you, but everything has gone from me. I don't know how to answer it.

R. D. Q. 83. What some of the frauds were? What they did in the bank suit?

(Objected to.)

A. There was false witnesses going up testifying what there was not a word of truth in.

R. D. Q. 84. You have seen Mr. Logan here once, you said in your examination; have you a recollection of seeing him before 1896, when he first came up and sat in that chair as you have testified, and told you of these frauds?

A. I don't know as I recollect that I ever seen him.

R. D. Q. 85. Is Erwin Davis your attorney at present?
(Question objected to as incompetent and improper on redirect examination.)

A. I suppose our lawyer, Mr. Logan is.

R. D. Q. 86. Erwin Davis—is he, or is he not your agent or attorney now, at the present time?

A. I don't know as I understand you.

R. D. Q. 87. Did you ever hear of any frauds through Erwin Davis?

(Objected to as improper upon redirect examination.)

A. I don't know as I—through Erwin? I don't know as I ever—only by—

Recross-Examination.

(By Mr. ALLEN.)

R. X. Q. 88. You were just saying only by? You testified on redirect examination that Mr. Logan came here about two years ago in September, and told you what you had seen in the paper; had you seen it in the paper before Mr. Logan told it to you about the false witnesses?

A. Yes, sir.

Re-redirect Examination.

(By Mr. KELLOGG.)

R. R. D. Q. 89. When did you see it in the papers, Mrs. Wood? A. September, I believe.

R. R. D. Q. 90. Of 1896? A. Yes.

R. R. D. Q. 91. The same year Mr. Logan saw you?

A. Yes; a little while before he come.

HARRIET WOOD.

Commonwealth of Massachusetts, }
 Hampden. } ss.

Subscribed and sworn to before me this 23d day of
 July 1898.

[Seal]

DEXTER E. TILLEY,
 Notary Public.

Commonwealth of Massachusetts, }
 Hampden. } ss.

I, Dexter E. Tilley, notary public within and for said county, do hereby certify that the reason for taking the foregoing deposition is, and the fact is, that the testimony of said witness is material and necessary for the complainant in the cause in caption of the said deposition named, and that the said witness lives, and did live at the time of taking said deposition, in the city of Springfield, county of Hampden, Massachusetts, the same being at a greater distance than one hundred miles from the city of Butte, Montana, where the court at which it is expected said cause to be tried was appointed by law to be held, viz., more than two thousand miles therefrom.

I further certify that on the twenty-third day of July, A. D. 1898, pursuant to the notice hereto annexed, I was attended at my office at 455 Main street, in said Springfield, by H. H. Kellogg for the complainant, and Horace G. Allen for the defendants A. J. Davis, Jr., and John H. Leyson, and by the consent of counsel, owing to the illness of the witness, Harriet Wood, adjourned the taking of said deposition to 427 Union street, in said Springfield, the residence of said witness, who was of sound

mind and lawful age, and the witness was by me carefully examined and cautioned and sworn to testify the truth, the whole truth, and nothing but the truth. The deposition of said witness was, by consent of counsel, taken down by a disinterested stenographer in the presence of the witness, and by her reduced to writing under my authority and in my presence, and after being so reduced to writing, and after being carefully read by me to said witness, said deposition was signed by said witness in my presence.

I further certify that H. H. Kellogg, Esq., appeared in behalf of the complainant and that Horace G. Allen, Esq., appeared in behalf of said defendants.

I have retained the said deposition in my possession for the purpose of sealing up and directing the same with this certificate, of reasons aforesaid, for taking said deposition with my own hands to the Court for which the same was taken, and I do further certify that I am not counsel nor attorney for either of the parties in said deposition in caption named, or in any way interested in the event of the said cause named in said caption.

In testimony whereof, I have hereunto set my hand and seal this twenty-third day of July, A. D. 1898.

[Seal]

DEXTER E. TILLEY,
Notary Public.

[Ten cent Doc. Stamp. Canceled.]

[Ten cent Documentary Stamp. Canceled.]

DEXTER E. TILLEY,

Commonwealth of Massachusetts, }
 Hampden. } ss.

I, Robert O. Morris, clerk of the Supreme Judicial Court, which is a court of record for the county and commonwealth aforesaid, do certify that Dexter E. Tilley, Esq., whose signature is above written, is a notary public within and for said county, duly commissioned, and acting under the authority of this commonwealth, and that full faith and credit is, and ought to be, given to his acts and attestations, done in that capacity; and that I am acquainted with the handwriting of the said Dexter E. Tilley, and believe his signature above written is genuine; also, that his term of office commenced on the 29th day of May, A. D. 1895, and will expire of the 29th day of May, A. D. 1902. In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Springfield, this 23d day of July, A. D. 1898.

[Seal]

ROBERT O. MORRIS,

Clerk.

[Endorsed]: Title of court and cause. Deposition of Harriet Wood, Dexter E. Tilley, N. P. Opened, filed and published, Sept. 22d, 1899. Geo. W. Sproule, Clerk.

Defendants' Exhibit, "United States Supreme Court Record."

(C. W. B., Special Examiner.)

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

October Term, 1897.

No. 517.

JOHN H. LEYSON, as Administrator,
with the Will Annexed, of Andrew J.
Davis, Deceased,

Plaintiff in Error,

vs.

ANDREW J. DAVIS, Jr., and THE
FIRST NATIONAL BANK OF
BUTTE.

In Error to the Supreme Court of the State of Montana.

Filed November 26, 1897.

(16,730.)

Filed Nov. 5, 1898.

GEO. W. SPROULE,

Clerk.

UNITED STATES OF AMERICA—ss.

The President of the United States of America to the
Honorable the Judges of the Supreme Court of the
State of Montana, Greeting:

[Seal of the Supreme Court of the United States.]

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit, between John H. Leyson, as administrator, with the will annexed, of Andrew J. Davis, deceased, plaintiff and appellant, and Andrew J. Davis, Jr., and the First National Bank of Butte, defendants and respondents, wherein was drawn in question the validity, of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said plaintiff and appellant, as by the complaint of Henry A. Root, Sarah Maria Cummings, Ellen S. Cornue, Joshua G. Cornue, Elizabeth S. Bowdoin, and Calvin P. Davis, heirs, next of

kin, and persons interested in the estate of Andrew J. Davis, deceased, appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 60 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the United States, the 29th day of October, in the year of our Lord one thousand eight hundred and ninety-seven.

JAMES H. McKENNEY,

Clerk of the Supreme Court of the United States.

Allowed by:

DAVID J. BREWER,

Associate Justice of the Supreme Court of the United States.

[Endorsed] Original. Supreme Court of the United States. John H. Leyson, as administrator, with the will annexed, of Andrew J. Davis, deceased, plaintiff in error, against Andrew J. Davis, Jr., and The First National Bank of Butte, defendants in error. Writ of error. Rob-

ert G. Ingersoll, Walter S. Logan, Charles M. Demond, Henry A. Root, of counsel for plaintiff in error. Filed Nov. 4, 1897. Benj. Webster, clerk supreme court, State of Montana.

State of Montana,
County of Lewis and Clarke, } ss.
District of Montana.

I, Benjamin Webster, clerk of the Supreme Court of the State of Montana, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the following pages, numbered from 1 to 328, inclusive, contain a true and complete transcript of the record and proceedings had in the said Supreme Court of Montana in the case of John H. Leyson, as administrator, with the will annexed, of Andrew J. Davis, deceased, plaintiff and appellant and plaintiff in error in said writ, vs. Andrew J. Davis, Jr., and The First National Bank of Butte, defendants and respondents, and defendants in error in said writ, as the same remain of record and on file in my office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of Helena, State of Montana, in the district of Montana, in the ninth circuit, this 15th day of November, in the year of our Lord one thousand eight hundred and ninety-seven, and of the Independence of the United States the one hundred and twenty-first.

Seal Supreme Court, State of Montana.]

BENJAMIN WEBSTER,
Clerk Supreme Court of the State of Montana.

Complainants' Exhibit, "Record of Bank Suit."

(June 21, 1898, C. W. B., Special Examiner.

In the Supreme Court of the State of Montana.

JAMES A. TALBOTT, as Special Ad-
ministrator of the Estate of Andrew
J. Davis, Deceased,

Plaintiff and Appellant,

vs.

ANDREW J. DAVIS, Jr., and THE
FIRST NATIONAL BANK OF
BUTTE, MONTANA,

Defendants and Respondents.

TRANSCRIPT ON APPEAL.

Appearances:

For appellant: McConnell, Clayberg & Gunn, Toole & Wallace, and W. F. Sanders.

For respondents: Forbis & Forbis, M. Kirkpatrick, W. W. Dixon.

Filed this 25th day of January, A. D. 1895.

BENJ. WEBSTER,
Clerk Supreme Court.

In the Supreme Court of the State of Montana.

JAMES A. TALBOTT, as Special Ad-
 ministrator of the Estate of Andrew
 J. Davis, Deceased,

Plaintiff and Appellant,

vs.

ANDREW J. DAVIS, Jr., and THE
 FIRST NATIONAL BANK OF
 BUTTE, MONTANA,

Defendants and Respondents.

Be it remembered that on the 11th day of August, 1894, a statement on motion for new trial was duly settled and signed by the Judge of the Second Judicial District of the State of Montana in and for the county of Silver Bow, that being the court in which said action was pending; which said statement was thereupon duly filed with the clerk of said court. Said statement contains all the pleadings and other papers used on the trial, together with the bills of exception duly settled and the judgment-roll. Wherefore they are not again inserted in this transcript, but may be found properly indexed in said statement. Said statement was and is in the following words and figures, to wit:

Be it remembered that on the 20th day of December, 1893, plaintiff filed his complaint herein, after which the following proceedings were had and done:

COMPLAINT.

[Title of Court and Cause.]

Now comes the plaintiff in the above-entitled action, and for cause of action against said defendants alleges:

I. That plaintiff now is and at all times hereinafter stated was the duly appointed, qualified, and acting special administrator of the estate of Andrew J. Davis, deceased.

II. That the First National Bank of Butte, Montana, one of the defendants herein, is now and at all times hereinafter stated was a national bank duly organized and existing under and by virtue of the laws of the United States.

III. That Andrew J. Davis, plaintiff's decedent, died on the 11th day of March, 1890, leaving a large estate, among which were and now are the following property, to wit, nine hundred and fifty (950) shares of the capital stock of The First National Bank of Butte, Montana, one of the said defendants, consisting of and represented by certificate No. 10, for four hundred and eighty-one (481) shares; certificate No. 14, for three hundred and forty-three (343) shares; certificate No. 22, for one hundred and sixteen (116) shares, and certificate No. 25, for ten (10) shares; that all and singular the said stock stood upon the books of said defendant, The First National Bank of Butte, in the name of said decedent at the time of his death, and yet stand on said books in his name; that each of said certificates contains the following provision, to wit: "Transferable only by him or his attorney on the books of this bank on the surrender of this certificate."

IV. That said decedent never indorsed, transferred, conveyed, or otherwise disposed of any of said stock to

any person or persons, but that at the time of his death was the sole owner of the same and the whole thereof.

V. That prior to the commencement of this suit and on the — day of December, 1893, this plaintiff presented to the officers of said defendant bank a certified copy of his letters of administration and demanded that said stock be transferred on the books of said bank to this plaintiff as special administrator of said estate, but said defendant bank refused and still refuses to make such transfer.

VI. That said decedent was not at the time of his death in any way indebted to said bank, and said bank has and claims no lien upon said stock or any part thereof.

VII. That said stock is of the value of over nine hundred and fifty thousand dollars (\$950,000).

VIII. That said defendant, Andrew J. Davis, now has the certificates representing said stock in his possession or under his control, claiming some right or title thereto or some interest therein; that this plaintiff on the — day of December, 1893, presented to said Andrew J. Davis a certified copy of plaintiff's letters of administration and demanded of said defendant the delivery and surrender to this plaintiff, as such administrator, of all of said certificates, but said defendant, Andrew J. Davis, then refused and still refuses to deliver or surrender said stock or any part thereof to this plaintiff, as such administrator or otherwise.

IX. That said defendant, Andrew J. Davis, is now and at all the times hereinafter stated was the cashier and one of the directors of the defendant bank and one of the officers who had charge of the transfers of stock on the books of said bank.

X. That said defendant, Andrew J. Davis, has not such financial responsibility as equals the value of said stock.

— That the claim of said defendant, Andrew J. Davis, to said certificates or of any interest therein is without merit or foundation in law or equity, but said claim and the possession thereof by said Andrew J. Davis casts a cloud upon the title of the plaintiff as such administrator, and prevents plaintiff from obtaining a transfer of said stock to himself as such administrator and holding the same subject to the operation of his trust.

XIII. That plaintiff is informed and verily believes that it — his duty as such administrator to obtain possession of said stock in specie as an asset of said estate, and hold the same as administrator, subject to the further order of the Court.

XIII. That the entire capital stock of said defendant bank consists of 1,000 shares; that said bank is an established institution with a large and increasing business, and that the dividends which will be earned on said stock and the increase in the value of said stock by the operation of said bank greatly exceed and will exceed the interest on the present value of said stock computed at the legal rate.

XIV. That plaintiff has no plain, speedy, or adequate remedy at law.

XV. This action is brought pursuant to an order of this Court made and entered on the — day of December, 1893, in the matter of the estate of Andrew J. Davis, deceased, herein pending, directing this plaintiff to institute this action.

Wherefore plaintiff prays:

1. That the claims of said Andrew J. Davis, defendant, be by this Court declared unfounded, void, and of no avail.

2. That said defendant, Andrew J. Davis, be, by decree of this Court, compelled to deliver and surrender to this plaintiff, as administrator, all of said certificates of stock.

3. That said defendant, The First National Bank of Butte, Montana, be, by decree of this Court, commanded to transfer said stock to this plaintiff, as administrator, upon the books of said bank, and to issue and deliver to said plaintiff as such administrator new certificates representing said stock.

4. For costs of suit.

TOOLE & WALLACE,

McCONNELL, CLAYBERG & GUNN,

Attorneys for Plaintiff.

Filed Dec. 20, 1893.

[Title of Court and Cause.]

SUMMONS.

The State of Montana sends greeting to Andrew J. Davis and The First National Bank of Butte, Montana, defendants:

You are hereby required to appear in an action brought against you by the above-named plaintiff in the District Court of the Second Judicial District of the State of Montana in and for the county of Silver Bow, and to answer the complaint filed therein within ten days (exclusive of the day of service) after the service on you of this summons, if served within this county, or if served out of this

county, but in this district, within twenty days, otherwise within forty days, or judgment by default will be taken against you according to the prayer of said complaint.

The said action is brought by the said plaintiff as special administrator of the estate of Andrew J. Davis, deceased, to recover judgment of the said Andrew J. Davis for the possession of nine hundred and fifty (950) shares of the capital stock of The First National Bank of Butte, Montana, one of said defendants, consisting of and represented by certificate No. ten (10) for four hundred and eighty-one (481) shares, certificate number fourteen (14) for three hundred and forty-three (343) shares of said stock, certificate numbered twenty-two (22) for one hundred and sixteen (116) shares of said stock, and certificate number twenty-five (25) for ten (10) shares of said stock, all of which stood upon the books of said bank in the name of said decedent at the time of his death, and which was the property of said decedent at the time of his death, and of which he was at that time the sole owner, and which said stock is of the value of nine hundred and fifty thousand (\$950,000.00) dollars, certificates of which said stock is now in the possession or under the control of the said defendant, Andrew J. Davis, and which he refuses to deliver, although demanded so to do, and which is claimed by the said defendant, Andrew J. Davis, and which said claim is without any foundation in law or equity, and also for a judgment of the Court decreeing and demanding the said defendant, The First National Bank of Butte, to transfer said stock to plaintiff as such special administrator upon the books of said bank, and to issue and deliver to said plaintiff as such special administrator new

certificates representing said stock, and which it has heretofore been demanded to do, and for costs of suit.

And you are hereby notified that if you fail to appear and answer said complaint, as above required, the said plaintiff will apply to the Court for the relief prayed for in the complaint.

Given under my hand and the seal of the District Court of the Second Judicial District of the State of Montana this 20th day of December, in the year of our Lord one thousand eight hundred and ninety-three.

[Seal of Court]

H. A. NEIDENHOFEN,

Clerk.

By James F. Wilkins,

Deputy Clerk.

Office of the Sheriff of
Silver Bow County, Montana. }

I hereby certify that I received the within summons on the 20th day of December, A. D. 1893, and personally served the same on the 20th day of December, A. D. 1893, by exhibiting the original and delivering a true copy thereof to Andrew J. Davis personally and Andrew J. Davis, he being cashier of The First National Bank of Butte City, Montana, in the county of Silver Bow, Montana, they being the defendants named in said summons.

Dated this 22d day of December, A. D. 1893.

Sheriff's Costs.

Service	\$1.00
Copies	1.60
Mileage40
	<hr/>
	\$3.00

Paid.

SAMUEL J. REYNOLDS,

Sheriff.

By Frank Geary,

Deputy Sheriff.

Filed December 22d, 1893.

[Title of Court and Cause.]

ANSWER OF ANDREW J. DAVIS.

Now comes the defendant Andrew J. Davis and for his separate answer to the complaint of plaintiff herein—

Denies that the shares of the capital stock of The First National Bank of Butte, Montana, described in the complaint, or any of them, or represented by the certificates mentioned in the complaint or any other certificates, were or are the property or any portion of the estate of Andrew J. Davis, deceased, left by him at his death.

This defendant denies that said Andrew J. Davis, deceased, never transferred or conveyed or otherwise disposed of any of the said stock of the said First National Bank of Butte described in the complaint to any person or persons, and denies that at the time of his death he was the sole or any owner of said stock or the whole or any

part thereof, but avers that at the time of the death of said Andrew J. Davis this defendant was and ever since has been the owner of all of the stock and the shares thereof and the certificates representing the same described in the complaint and in possession thereof, as hereinafter more particularly stated.

This defendant admits that he is now and for several years last past has been the cashier of The First National Bank of Butte, but denies that he is now or has been at any time since shortly after the death of said Andrew J. Davis a director of said bank.

This defendant denies that his claim to the shares and stock and the certificates thereof described in the complaint is without merit or foundation in law or equity, or that said claim or the possession of said stock or certificates by this defendant casts any cloud upon any title of plaintiff thereto, and avers that plaintiff has no title or right thereto, but that this defendant is in law and equity the owner thereof.

This defendant, further answering, avers that he was a nephew of the said Andrew J. Davis, deceased, and had been cashier of said First National Bank for several years before the death of said Andrew J. Davis, and for some time before said death this defendant had managed and attended to all the business of said bank; that in the latter part of the month of December, 1889, the said Andrew J. Davis was and had been for some months seriously and dangerously ill and suffering from the disease and ailment of which he afterwards died; that he was then about seventy years of age, and was preparing to travel to the Pacific coast for his health; that thereupon, on the

twenty-seventh or twenty-eighth day of December, 1889, at Butte City, in the county of Silver Bow, and State of Montana, the said Andrew J. Davis, being seriously and dangerously ill and suffering from the disease and ailment of which he afterwards died, but being of sound and disposing mind and in view and in apprehension and expectation of his death from said disease or ailment or otherwise, gave to this defendant, as a gift, the shares and stocks and the certificates thereof of the said First National Bank of Butte, which are described in the complaint, and at the same time delivered said certificates of stock to this defendant as a gift, and this defendant then and there received and accepted the same; that thereafter, on the 11th day of March, 1890, at Butte City, Montana, the said Andrew J. Davis died from the same disease and ailment from which he was suffering at the time he made the gift and delivery of said stock and certificates thereof to this defendant, as above stated, and that this defendant has ever since said gift and delivery retained and held in his possession and claimed as his own and does now so hold in his possession and claim as his own all of the said shares of stock and the certificates thereof described in the complaint, and is now the owner thereof and entitled to have the same transferred to him upon the books of the said bank; but the said bank and the directors thereof have heretofore refused and now refuse to permit said stock and shares to be transferred on the books of said bank to this defendant or the plaintiff herein until the rights of the parties to said stock and shares are settled and determined by the Court.

Defendant, having fully answered, asks that plaintiff take nothing by his complaint herein, and that by decree of this Court this defendant be decreed and adjudged to be the owner of each and all of the shares of stock and the certificates thereof of the said First National Bank of Butte which are described in the complaint and entitled to have the same transferred to him on the books of said bank; that it be also adjudged that plaintiff, as special administrator of said estate of Andrew J. Davis, deceased, or otherwise, has not, nor has said estate any right, title, or claim to said shares, stock, and certificates thereof or any part thereof; that the defendant bank herein be ordered to transfer said shares and stock to this defendant and issue to him new and proper certificates therefor, and that this defendant have any further and equitable relief in the premises that may be necessary and proper, and that he recover of plaintiff or of the estate he represents his, defendant's costs of this action.

M. KIRKPATRICK,
FORBIS & FORBIS, and
W. W. DIXON,

Attorneys for Defendant Andrew J. Davis.

Duly verified.

Filed January 6th, 1894.

[Title of Court and Cause.]

ANSWER OF FIRST NATIONAL BANK.

Now comes The First National Bank of Butte, Montana, one of the defendants in the above-entitled action, and for its separate answer to the complaint of plaintiff herein states that as to whether or not the shares of the

capital stock of this defendant described in the complaint were or are the property or a portion of the estate of the said Andrew J. Davis, deceased, left by him at the time of his death, or as to whether or not said decedent never indorsed or transferred or conveyed or otherwise disposed of any of said stock to any person or persons, or as to whether or not he was the sole owner of the same and the whole thereof, or as to whether or not the claim of the defendant Andrew J. Davis herein to said certificates or of any interest therein is without merit or foundation in law or equity, or as to whether or not said claim and the possession thereof by said Andrew J. Davis casts a cloud upon any title of plaintiff, as administrator or otherwise, this defendant bank is not advised, but insists upon proof thereof, so far as may be necessary to protect the rights of this defendant in this action.

This defendant, further answering, states that defendant Andrew J. Davis is now and has been for several years last past the cashier of this defendant bank, but denies that he is now or has been at any time since shortly after the death of said Andrew J. Davis, deceased, one of the directors of this defendant.

This defendant, further answering, avers that it has no interest in this controversy further than to protect itself; that it has heretofore refused and now refuses to make any transfer on its books of the shares and certificates of stock described in the complaint, although requested by both plaintiff and defendant Andrew J. Davis so to do, but that this defendant is ready and willing to make such transfer whenever it can do so with safety to itself, to whoever the Court may hold, upon final decision of this

body's orders but your own, which may only effect subsequent business of your own, and that if you will deal with me personally, and with nobody else, I will religiously carry out every stipulation in this instrument.

I am very serious in this thing, and want you to know that I have positive assurance that if I rescind my testimony, even to the verge of perjury, that I will be fully protected to any amount. I do not do this in the form of a threat, but, only as a reasonable consideration for what I know I have done for you.

Candidly consider this without bias, weigh every point in the case. I place myself in jeopardy in doing this, yet I do it with my eyes open. No other consideration except the above stated will go. Give me a hearing at John Davis's store to-morrow at 2 o'clock P. M. as that is the extreme limit that I have from other sources.

Copy.

Yours truly,

The next exhibit in regular order is letter of Feby. 19, 1890, shown at page 262 of this record and is not here repeated.

Complainant's Exhibit, "Darnold Affidavit."

(No. 58. Harriet Wood et al. vs. A. J. Davis et al. Darnold Affidavit. Dated July 12, 1894. June 21, 1898. C. W. B., Spl. Examiner. Endorsed: McConnell, Clayberg & Gunn, Attorneys, Helena, Montana.)

In the District Court of the — Judicial District, in and for the County of Silver Bow, State of Montana.

JAMES TALBOTT, Special Administrator of the Estate of A. J. Davis, Senior, Deceased,

vs.

A. J. DAVIS, Junior, and the First National Bank of Butte.

State of Montana, }
Lewis & Clarke County, } ss.

Personally appeared before the undersigned, a notary public in and for said county and State, William C. Darnold, and made oath in due form of law that he is the same William C. Darnold who testified in behalf of the defendants in the above-entitled cause upon the trial of same in the District Court of Silver Bow county; that for several months before he did so testify, he had been drinking, and had at times taken chloral, when suffering from nervous prostration; that he was out of employment and des-

titute, and had been for sometime, and was much depressed in mind; that while in this morbid condition of mind, he delivered the testimony given upon said trial.

Affiant further states that said testimony was not true; that he had no such conversation as detailed in said testimony with A. J. Davis, Senior, Deceased, but that he did have a conversation with said A. J. Davis, Senior, deceased, about the latter part of August, 1886, at which time he was engaged as bookkeeper in the First National Bank of Butte, and had had some trouble with his books with the defendant, A. J. Davis, Junior, and in the conversation that he had about the last of August, 1886, with A. J. Davis, senior, he complained to him of the treatment of said defendant, A. J. Davis, junior, when the said deceased said to him that he had better go back to work, as Andy (referring to A. J. Davis, Junior) would eventually own the bank; that this was the only conversation he had with said Deceased in regard to the defendant, A. J. Davis, Junior, owning the bank; that all he stated upon the witness stand in reference to the conversation had with said Deceased shortly before he died, stating to him in substance that he had given the stock of the defendant, the First National Bank, to the defendant, A. J. Davis, Junior, is not true; that the said Deceased at said time and place, nor at any other time and place, made any such statement to him.

Affiant further states that, while no one had offered him any consideration, or made him any promises to induce him to give the above testimony, he was led to believe, while in the morbid condition of mind above referred to, that he would be liberally rewarded by the

defendants for so great a favor as giving the testimony which he did give would be.

Affiant further states that an hour or so after he had testified, one Myer Ganzberger, a resident of the city of Butte, with whom affiant was well acquainted, came to him on the street and asked him if he did not wish to take a drive to Gregson's Springs, situated about 18 miles from Butte City; that affiant agreed to go with said Ganzberger to said springs, and they went to a livery stable and procured horses and buggy and drove to said Gregson's Springs; that while affiant and said Ganzberger were at said Springs, said Ganzberger made arrangements with the proprietor thereof for affiant to return and spend some days at said springs, and that affiant did so return and remain there from Saturday until the following Thursday; that on Tuesday of the same week, said Ganzberger came to said Springs and proposed to affiant to go to California, but affiant said that he had been to California, but, if he was allowed to choose, he would prefer to go to his old home in Piqua, Ohio, and this was agreed to by said Ganzberger.

Affiant further states that, according to this agreement, he was taken by said Ganzberger to Piqua, Ohio, where affiant remained some two and a half weeks, but said Ganzberger went to Washington, D. C., or left affiant for the avowed purpose of going to said Washington City, and afterwards affiant received a telegram from said Ganzberger to meet him in Cincinnati, which affiant did, and they returned to Butte City, arriving there some ten or twelve days ago.

Q. How well were you acquainted with him and was your acquaintance with him intimate or not?

A. Well, I was very intimately acquainted with him for the last eighteen or twenty years.

Q. Were you or not connected with Judge Davis in business at any time? A. I was; yes, sir.

Q. If so, when and how long?

A. I was connected with him in mining and milling I think about seven or eight years before he died. Well, it was twelve years before he died, I guess; very near.

Q. What kind of business? A. Mining.

Q. At the time of his death what position, if any, did Judge Davis hold in the First National Bank of Butte?

A. President.

Q. Do you know Andrew J. Davis, one of the defendants in this action—frequently called Andy Davis, and whom in my questions to you hereafter I will designate as Andy Davis to distinguish him from Judge Davis?

A. Yes, sir; I know him.

Q. How long have you been acquainted with Andy Davis?

A. Well, I think I must have been acquainted with him about twelve years or it might be a little more.

Q. Did you or not know him before he came to Montana? A. No, I didn't.

Q. How well and how intimately have you known him?

A. Well, I have known him very intimately for, say, eight or nine years.

Q. What is his business?

A. He is cashier now of the First National Bank of Butte.

Q. How long has he been cashier?

A. I guess he has been cashier about three years, probably, or a little over—three or four years.

Q. Before he was cashier how long had he been employed in the bank, if you know?

A. Well, I think ever since he came to the State, and that would be about twelve years, probably, I should think, I couldn't say positively about that.

Q. You are not exact about these matters?

A. No; I am not exact about these matters. I never paid any attention to it.

Q. State, if you know, who managed the business or affairs of that bank for the last two years or thereabouts before Judge Davis death.

A. Andy Davis.

Q. What relation, if any, was Andy Davis to Judge Davis?

A. Nephew, as I understood.

Q. Did you at any time hear Judge Davis say anything as to the business capacity or character of Andy Davis or as to his, Judge Davis', affection or liking for him; if so, when and what did Judge Davis say?

Mr. TOOLE.—Objected to as incompetent and immaterial.

Mr. KIRKPATRICK.—We might as well settle that question now, as we propose to introduce evidence as to the relations existing between the parties, the donor and donee, the feelings of affection and confidence, and the whole relation that existed between them; also to show by prior declarations of the donor, Judge Davis, that he intended to make a gift of this stock to the defendant,

the donee. We think that the law is clear upon this proposition.

Mr. TOOLE.—We object to the question more particularly because it is as to his business capacity, which, we think, has no bearing upon the matter of the gift at all.

(Objection overruled. Plaintiff excepts.)

A. As to his business qualifications, the Judge thought there was nobody like him. Pertaining to the bank and so on he always thought he couldn't place anybody like him.

Q. Go on and answer the question in your own way. Of course, it is part of the question when and where you heard Judge Davis say anything with reference to Andy Davis' business capacity and character or as to his affection or liking for him.

A. Well, he always spoke of him as a good business man and just the man he wanted there and had to have, and that he was lucky to have him there. As to the time, I couldn't give any time, because he spoke that to me many a different time.

Q. During what years, can you say?

A. Well, I can say the last year of his life. I know he talked to me in 1889.

Q. More than once?

A. Yes; I think a great many different times.

Q. When and what, if anything, did he say in reference to his affection or liking for Andy?

A. Well, he always spoke to me of him as a father would of his son. He felt that way, apparently, from his talk to me; he felt proud of him.

Q. Was that only on one occasion or frequently?

A. Frequently, sir; frequently.

Q. Did you at any time before the 27th or 28th of December, 1889, hear Judge Davis say anything as to what disposition he intended to make of the First National Bank of Butte, or his stock in it, in case of his death? If so, when, and what did he say?

Mr. TOOLE.—We object to that upon the same ground as heretofore—that it is incompetent and inadmissible for the reason that the validity of this gift depends exclusively upon what transpired and was said at the time it was made.

(Objection overruled. Plaintiff excepts.)

Q. State if you ever heard him say anything about it, and, as near as you can, when it was and what he said.

A. Well, it was about that time—the 27th or 28th—that he gave that stock to Andy.

Q. Well, this question relates to before that time.

A. Well, I heard him say that he never intended the bank to go in his estate; that he had always intended that for Andy, and that was what he expected to do with it.

Q. Can you say when that was?

A. Well, that was, I think, after the fire at the bank, as near as I can recollect, and that was in September, 1889. When he talked to me about that I think it was across the street, when he moved across after the fire.

Q. Did you hear him say that on more than one occasion?

A. Yes, sir; I heard him say it more than once; different times.

Q. Did you see Judge Davis about the 27th or 28th of December, '89? A. Yes, sir.

Q. Where did you see him?

A. I saw him at his residence in Butte, East Broadway; that was about the 27th of December, '89.

Q. Were you present at that time at any conversation that occurred between Judge Davis and Andy Davis relating to certain stocks or shares in the First National Bank of Butte, owned by Judge Davis?

A. Yes, sir; I was.

Q. Give, as nearly as you can, the day of the month and the year when this conversation took place.

A. Well, it must have been between the 27th and 29th of the month that that thing transpired.

Q. What year? A. 1889—December, 1889.

Q. You can't give the date any more definitely?

A. No; I can't make it any closer than that because I had some papers signed on the 27th of the month, I had some deeds, and that is the only way I can get back to that time, but when this thing came up I didn't know just when it was.

Q. You don't know just how long it was before he went away?

A. It was not more than a few days. He went away before New Year's.

Q. But you can't say the exact date?

A. I can't say the exact date; no, sir.

Q. It was between the 27th and the 29th? .

A. Yes, sir.

Q. What time of day was it when this occurred?

A. It was in the evening.

Q. After dark? A. Yes, sir.

Q. Who was present at that conversation?

A. Andy Davis and Judge Davis and myself.

Q. Any one else that you remember of?

A. They couldn't have been any one else that I know of that came from the outside. There might have been somebody in the house that lived there with him, Mr. Wehrspaun's family, but I couldn't say that anybody was in there.

Q. You don't remember?

A. I don't remember anybody else.

Q. How did you come to go to Judge Davis' house on that occasion?

A. Well, he had been for seven or eight days there settling, he and I, and Andy was with us all the time, and whether we wound up everything on the 27th or not, as to our business, I don't recollect positive on that, but that was the night that he signed this deed.

Q. What deed?

A. A deed to some property that he deeded to me.

Q. When you went to Judge Davis' house that evening, who was there besides him?

A. There was not anybody.

Q. Who came there afterwards, if anybody?

A. Andy came in.

Q. When Andy came, did he bring anything with him that you remember of?

A. Yes, sir; he fetched a box there with him, an iron or tin box, as it might be called.

Q. What kind of a box?

A. Iron or tin; I don't know what you might call it; it was painted.

Q. Do you know whose box that was?

A. It belonged to the Judge.

Q. Had you seen it before that time?

A. Yes, sir.

Q. Do you know where it was generally kept?

A. It was kept in the vault at the bank.

Q. Do you know what it contained, in a general way?

A. Well, I didn't know particularly what it contained until that night.

Q. Do you know who kept the key of that box?

A. Well, he had it—Judge Davis had it himself.

Q. At the time of this conversation, what was the condition of Judge Davis' health?

A. His health was poor.

Q. How long, if you know, had he been sick or in poor health?

A. Well, I think he had not been in good health—well, he had been four or five or six months in very bad health.

Q. Four or five or six months before this?

A. Before this; yes, sir. Worse than common, you know. He had not been well for a year or more.

Q. State what, if anything, you ever heard Judge Davis say prior to the time of this conversation as to his expectation of recovering his health.

Mr. TOOLE.—We object, as it is a declaration prior to the time of the gift that is called for touching his health at that time.

Mr. DIXON.—We expect to follow that up by showing

what his expectation as to recovering or not was at the very time of this gift.

(Objection overruled. Plaintiff excepts.)

A. Well, he often said to me that he didn't never expect to recover from it; that he was too old to get over it; couldn't overcome the disease.

Q. Did he say that to you on more than one occasion?

A. Oh, yes; he spoke to me about that many a time. I would take him sometimes in the buggy and ride him up on the hill, and he would say that he was too old to handle this disease that he had, you know.

Q. How old was he at that time; do you know?

A. Well, he was about seventy when he died, and that was a year before. I think he was right close to seventy, if I recollect right. I recollect seeing the date of his age at that time, and I think it was close to seventy; maybe a month or two over or under. I have forgotten exactly about that.

Q. At the time of this conversation what was the condition of Judge Davis as to his soundness of mind and capacity to transact business?

A. Well, I think he could transact business as good as he ever could in his life, as far as I know, indeed, or ever seen him. I had quite a settlement with him, and I don't think that he overlooked anything.

Q. Did he transact on that day or the day before any other business outside of that relating to the bank, that you know of?

A. Well, I had business with him right up to this time. You say the day before?

Q. Yes.

A. Well, he did transact business with me, but I don't know of anybody else.

Q. What did this business relate to?

A. Well, it was a settlement of money that I owed him on the sale of the mines.

Q. A settlement of accounts between you and him?

A. Yes, sir; between me and him.

Q. Did that extend over a considerable period of time?

A. Well, I think it was about seven years and seven or eight months that this account had been running.

Q. It included many different matters?

A. Yes, sir; many different matters; and it covered considerable money.

Q. That was all settled up between you and him, was it?

A. Yes, sir; all settled up.

Q. Did you say that was the same day or the day before?

A. Well, it might have been the day before that we settled everything up. When the deed was signed it might have been on the 27th, which would make it on the 27th or the 29th or some time.

Q. Was the deed signed on the same day of the conversation?

A. Well, I couldn't say positive whether it was the same day the deed was signed or not.

Q. I am not sure that you answered the question I asked you with reference to the condition of Judge Davis as to his soundness of mind. At the time of this conversation how did he appear and act?

A. Why, his mind was all right as far as I could see.

I couldn't think anything else but that his mind was perfectly sound. From the business that I transacted with him I couldn't think anything else. He might be a little tired; it had taken a little long, and he might be a little tired, and that was the reason it took so long. We wouldn't be there more than three or four hours in the evening, and then we would let him have a rest, and he would get tired and we said we would let it go till next day. He would get a little tired, but he was all right.

Q. How long had that been going on?

A. Seven or eight days.

Q. And during that time he would talk about your business affairs every day? A. Yes, sir.

Q. And matters were finally concluded between you there the day before or the same day that this conversation took place?

A. Yes, sir; the 27th, I believe, is the day that we wound up our business, and this other thing might have come the next day, for all I know; I don't know about that.

Q. It was that day or the next? A. Yes, sir.

Q. Now, Mr. Talbott, I want you to state as fully and as precisely as you can all that was said and done and that occurred at this conversation between Judge Davis, Andy Davis, and yourself between the 27th and 29th days of December, 1889, and which you have referred to. I would like you to go on and state everything that was said and done by everybody there as nearly as you can.

A. Well, he ordered the box fetched down the day before. Now, that might have been the 27th that he or-

dered the box. He said, "When you come down to-morrow fetch my box down," and he told me to come down, too. I came down ahead of Andy and was there in the room and Andy came down later on, and the Judge was down below in the kitchen or down in the dining-room below, and he came up after Andy came. I am not sure whether Andy went down after him or not, but anyway he came up, and then he wanted to look at these papers in the box, and he unlocked the box and pulled the papers out on the table.

Q. That is, the Judge did?

A. Yes, sir, and looked around them awhile and finally said, "Where is all of this? this isn't all; there is something that is not here," he says, and it appeared that he got them all pulled out together and did not get them all. Andy told him he guessed they were all there and he pulled the papers over and looked at them and found the missing papers and figured up and said they were all there.

Q. Who did that? A. Andy did.

Q. What stock was this?

A. It was the stock of the First National Bank of Butte. Andy figured it up and told him, "That is all; it is all here." "Well, now," he says, "there is fifty shares in the directors' hands." Then he commenced going over the directors, and he came down to Hauser, and it appeared as if Hauser had nothing there; he had nothing there to represent from Hauser.

Q. What do you mean?

A. Nothing to show how Hauser held that stock. So he said to Andy, "You write to Hauser and see that he

signs a contract, and do it right away," he says. Then the stock was all right; they understood then that there was nine hundred and fifty shares. Andy counted it up. There were 950 outside of what the directors had. Andy passed them over to the Judge after he figured up and showed him what there was of it, and he passed it back again, and he said, "I have always intended that for you; you take that."

Q. The Judge passed it back to Andy?

A. Passed it back to Andy; yes, sir.

Q. After Andy had figured it up and handed it to the Judge?

A. Yes, sir.

Q. And said what?

A. He said, "I have always intended that for you," he says, "and I want you to take it."

Q. Well, what did Andy do?

A. Well, Andy took it, and I sat there, and it was a kind of a surprise to me. I didn't expect anything of that kind. I didn't know what he did. I supposed he had his business or maybe would fix his business in a different way, but he did that and he said, "I always intended to do that, and now I will do it." Andy picked up the stock and we commenced talking to him and telling him that we didn't think that he was so ill.

Q. What did Andy do with this stock?

A. He put it in his pocket. We told him we didn't think he was so seriously ill as he might think. "Well," he says, "I am an old man," he says, "and there is no telling. I can't stand what I used to. I don't think I can ever get over this disease," he says; "I can't stand it; I am too old; I can't expect it."

Q. State, as near as you can, just what he did say in reference to his expectation of recovering or not.

A. Well, he just said that he didn't expect he could. He said we might think it, but, he says, "I don't. I only hope it will be so, but I don't think it."

Q. What did you or Andy say to him?

A. Well, we told him that we thought he would if he would go down there and give his business up and not be bothering about it; we thought he might improve.

Q. What do you say that he thought about it?

A. Well, he said he didn't think it. He said he was going to try it, anyway. He said, "I will get ready and go in the morning," and I think he went the next day after that.

Q. I believe you stated after Judge Davis gave Andy this stock what Andy did with it.

A. Yes, sir; he put it in his pocket.

Q. After the stock was given to Andy what was done with the box?

A. Andy fetched the box back to the bank.

Q. What was done with the key, do you remember?

A. I couldn't say.

Q. You don't remember who kept the key?

A. No; I couldn't say.

Q. How many certificates of stock were there—that is, how many pieces of paper? A. Four pieces.

Q. If I understood you correctly, you said that Andy figured up this stock? A. Yes, sir.

Q. There were four certificates, you said?

A. Yes, sir.

Q. When Andy figured up the certificates of stock did he or not have them in his hand?

A. Andy had them in his hand; yes, sir; at that time when he figured them up.

Q. When he figured them up what did he do with them? A. He handed them back to the Judge.

Q. What did the Judge do with them?

A. He handed them over to Andy.

Q. Were they the same certificates?

A. Yes, sir.

Q. State whether or not you ever saw those certificates of stock afterwards. A. No, sir; I never have.

Q. After that conversation, you mean?

A. Yes, sir.

Q. Did you or not ever have those certificates in your possession as special administrator?

A. No, sir.

Q. Or otherwise? A. No, sir.

Q. State, if you know, how soon, if at all, after Judge Davis gave Andy these certificates of stock, as you have testified, Judge Davis left Butte.

A. Well, I think he left the next morning; that is my opinion.

Q. Where did he go?

A. Well, he started to go to the sound and stopped at Tacoma. I believe that is where he stopped at.

Q. State, if you know, from Judge Davis' declarations or otherwise, why he left Butte after that conversation.

Mr. SANDERS.—Objected to; incompetent and hearsay testimony; not touching any proposition upon which

hearsay testimony is admissible; not a part of the res gestae.

(Objection overruled. Plaintiff excepts.)

A. He went, so he said, to see if he could not improve his health.

Q. Who went with him, if you know?

A. John A. Davis, his brother.

Q. State, if you know, when he returned to Butte.

A. Well, that I couldn't say—the time he returned, how long he was gone, or anything of that kind.

Q. State, if you know, who came back with him.

A. Andy came back with him.

Q. What has become of John J. Davis, if you know?

A. He is dead.

Q. After Judge Davis returned to Butte, where did he remain until his death?

A. At his residence, in Butte.

Q. State whether or not you saw him soon after his return to Butte?

A. I saw him the morning that he came back, the same morning.

Q. When he returned to Butte, what was the condition of his health and strength as compared with what it was when he left Butte?

A. It was worse. He was worse off when he came back than he was when he went away.

Q. A little worse or a good deal worse?

A. Oh, considerably worse.

Q. From the time of his return to Butte, how frequently did you see him up to the time of his death?

A. I think every day.

Q. After his return to Butte and up to the time of his death, what was his condition as to health or improvement in health?

A. He went down all the time from the time he came back.

Q. Do you know how long it was after he came back before he died?

A. No; I don't because I can't place the time that he was gone down there.

Q. Can't place how long it was?

A. No; I couldn't place it.

Q. Well, you have some idea about it, haven't you?

A. Well, I should think that it was probably three weeks or maybe four before he died after he came back.

Cross-Examination.

(By Mr. TOOLE.)

Q. How long did you say you had known Judge Davis before his death? A. I think I knew him since '64.

Q. What were your personal relations with him?

A. Back in early times?

Q. Yes, sir; that is what I mean.

A. Well, I had at one time—about the only business I ever had with him was I bought some liquor from him.

Q. Well, personally, friendly or otherwise?

A. Oh, friendly, certainly. I thought you meant in a business way.

Q. What were your business relations with him prior to his death?

A. Well, I never had anything, as I told you, outside

of buying that liquor from him, and then afterwards we were in partnership here in mining ventures.

Q. How long have you known Andrew J. Davis, Junior, the defendant here?

A. I have known him ever since he came here, and I think it must be ten or twelve years.

Q. What official position does he hold in the First National Bank, if any?

A. He is there now as cashier.

Q. What official position, if any, do you hold in the bank?

A. Vice-president.

Q. How long have you held that official position?

A. I think it is about three years.

Q. It has been since the Judge's death?

A. Yes, sir. I was a director before.

Q. How long has Andy held the position of cashier of the bank?

A. He held it before the Judge died. I don't know whether he was cashier or assistant cashier at that time; it was one or the other.

Q. You spoke of Judge Davis being president of the bank.

A. Yes, sir.

Q. How long was he president of the bank?

A. From its organization.

Q. Up till what time?

A. Till his death.

Q. Did he not hold also the office of director of the bank in connection with that of president?

A. I don't think that he did hold office as director; I am not sure. I don't know exactly, but the books will show that.

Q. What have been your personal relations with Andy since you have known him?

A. They have been good all the time.

Q. Friendly? A. Yes, sir.

Q. What have been your business relations with him since you have known him?

A. I have had no business personal relations with him in any way.

Q. Have you been interested with him in any investments or anything of that sort lately?

A. Well, we have been interested in some little purchases, like the purchase of a mine, or locating it, or patenting it, or something like that.

Q. Well, you are partners in some mines in operation, aren't you? A. No, sir.

Q. You mean that you are not operating the mine?

A. No, we are not operating it; but we own some like that together, jointly.

Q. How long have you been partners or joint owners in these mining properties?

A. I don't think it is over four years, probably. The records will show that, where we are interested together. I should say something like that that, though.

Q. Who has had charge and control of the business of the bank since the death of Judge Davis?

A. Well, I suppose he has had charge of it as cashier, and the directors have acted with him, like what we should do and what should be done, and so on, and advised with him in regard to such things as that.

Q. Who has? A. The directors of the bank.

Q. Have you not what is known as an examining committee or anything of that sort—a discount committee?

A. No, I don't think we have anything of that kind. It is not headed in that way exactly.

Q. Who attends to that branch of the business?

A. The directors, I think, attend to all of that.

Q. Is there any other matters in which you and Andy are partners or interested together—any other corporations or anything of that kind?

A. Yes, sir; there is a corporation down in the Flat-head country that he is interested in some, and I am interested in the same corporation.

Q. Do you hold your stock jointly? A. No, sir.

Q. You say that Judge Davis acted as president of the bank up to the time of his death, did he?

A. Yes, sir.

Q. Who signed the drafts that were issued by the bank? A. When he was alive?

Q. Yes, sir, when he was alive.

A. Well, at the time Mr. Hyde was there he was cashier and he used to sign the drafts. Afterwards, when Mr. Davis was cashier, I suppose he signed them.

Q. Were they signed by the president—any of them?

A. No, the president didn't sign, not unless there was no cashier there. He might do it then, just as I do now—if Andy should be out, I sign drafts as vice-president.

Q. You say that the Judge acted in the capacity of president all the time he was there? A. Yes, sir.

Q. Were there any stockholders' meetings held after the 27th of December, 1889?

A. Yes, sir; there have been stockholders' meetings held.

Q. Do you remember about when the first stockholders' meeting was held?

A. The first one after the 27th?

Q. After the 27th, yes, sir.

A. Well, I can't tell the date, but it was held at the regular time.

Q. Was it the fourteenth of January?

A. I couldn't say. Whatever time it was I suppose it was held at that time.

Q. Was the Judge present at that meeting?

A. We are speaking of after his death. No, sir; he was not.

Q. I speak of after the 27th of January, 1889.

A. Well, no, he was not at any meetings after that.

Q. Do you know whether any one actively and actually represented him in that meeting?

Mr. DIXON.—We object, first, that this is not cross-examination, and, second, that the best evidence of that is the minutes of the meeting, the records of the bank. It is calling for something the best evidence of which is the minutes of the meeting.

(Objection overruled. Defendant excepts.)

A. Well, to the best of my recollection, he was represented by a proxy from him.

Q. By whom? A. By John E. Davis.

Q. You speak, Mr. Talbott, of a tin box having been brought to the Judge's residence the day before, do you?

A. No, sir.

Q. The day before the gift that you refer to?

A. No, sir.

Q. When was that brought down to his residence?

A. It was brought down the same day that the gift was made.

Q. Did you not say something about his having directed it to be brought down the day before?

A. The day before he ordered it. He said, "When you come down you fetch that box of mine down."

Q. And this is the box, you take it, he referred to at that time? A. Yes, sir.

Q. And who do I understand he said this to—to bring the box down?

A. To Andy. He said, "When you come down tomorrow evening, you fetch that box down."

Q. In endeavoring to fix the date at which this gift was made, Mr. Talbott, you do it by reference to the execution of a deed by the Judge to yourself, do you?

A. Yes, sir.

Q. Where was this deed executed?

A. Down in his house—right in his house there.

Q. He had a little front-room office with a writing stand or table in the center, did he not?

A. Yes, sir.

Q. Was this deed executed at this little stand or table? A. Yes, sir.

Q. He signed it there? A. He signed it there.

Q. Where was Judge Davis sitting at the time that he gave this stock to Andy?

A. Well, he was sitting like if Mr. Dixon was sitting at the corner of the stenographer's table; I was sitting about this way and Andy was sitting about where the stenographer is; that was about the position.

Q. All around this little writing desk there together?

A. Yes, sir; a small little table. It is not as large as the stenographer's desk.

Q. How was the Judge's health during this time that you were having these business settlements with him?

A. It was poor; very poor, I think.

Q. You couldn't see any perceptible change in him from the time you commenced settling the business until he left, could you, or observe any?

A. Well, I couldn't say that he got any particularly worse or failed from day to day or anything. He went along about the same.

Q. Apparently about the same that he was in the beginning?

A. Yes, sir.

Q. Who did the figuring during the time that you were having this settlement with the Judge?

A. Andy done it.

Q. Did he assist any in doing it?

A. No; he didn't assist any.

Q. He was present and participated in it?

A. Yes, sir.

Q. When he called for this box was it placed on this little writing stand or table?

A. Yes, sir.

Q. The same one upon which this deed was signed?

A. Yes, sir; the same table.

Q. Was this stock unfolded—those certificates of stock, were they unfolded and opened up?

A. Well, he pulled them out of the box and they were all together. There were other papers in the box besides the stock, you know.

Q. Were they unfolded and examined?

A. Yes, sir.

Q. Are you familiar with the stock of the bank?

A. Yes, sir.

Q. Has this stock blank assignments on the back of it for signature? A. Yes, sir.

Q. How long was it, if you can fix it, from the date that Judge Davis made this gift until he left here for Tacoma?

A. Well, my impression is that he left the next day after that gift; that is my impression, but I am not certain.

Q. Now, can you get at about what day in December it was that he made this gift? What day would you say it was, the 27th or the 28th?

A. Well, if I was going to say, I think it was the 27th, because, I think, he signed the deed the same night that the stock was given, on the table.

Q. Which did he do first, did he sign the deed before he gave the stock or afterwards?

A. He signed the deed before.

Q. You think it was signed the day before?

A. No; I don't know whether it was signed the day before or the same night; I couldn't say.

Q. You can't say really whether or not, then, this deed that was executed to you was signed at the same time or not that he gave this stock?

A. No; I couldn't say positively as to that; I couldn't say.

Q. It may have been signed at the time you had this conversation, may it not? A. Yes, sir.

Q. You think it is more probable that he left the next day?

A. After he made the gift I am satisfied he went the next day.

Q. You fix the date of that by the signature and date of the deed? A. Yes, sir.

Q. At the time that you say Judge Davis gave Andy this stock, did he make any written assignment of it or sign this blank assignment of it on the back of the stock?

A. No, sir; he did not.

Q. This room and writing desk that you refer to was in the front end of the building, wasn't it?

A. No, sir; it was in the back end.

Q. In the back end of his residence?

A. Yes, sir; the back end of the building, where his bed and all was in the same room. It was the last room that he ever used in the house.

Q. Were you acquainted with the business habits of Judge Davis, Mr. Talbott?

A. I think I was; yes, sir.

Q. You have had a great deal of business with him, one way and another, in the last eight or ten years before his death, haven't you? A. Yes, sir.

Q. What were his habits with respect to fixing up business in a business-like way and consummated things in a business manner?

A. Well, I used to think that he was pretty apt to do a thing up right.

Q. Generally left nothing undone when he undertook to finish up his business, did he, about business matters?

A. Well, I didn't think he would. I always thought he was a man that—

Q. He was apt to consummate things in pretty good shape? A. Yes, sir.

Q. So as to leave no questions about it? A. No.

Q. Wasn't he a very particular man to see that things were done up in such shape that there could be no contention about it?

A. That was what he always aimed to do, sir.

Q. Wasn't he especially that way in making things certain and absolute?

A. Well, a man would think it if he went to get anything from him. When he got done he would think he wanted to have it fixed just right.

Q. So there would be no question about it afterwards?

A. Yes, sir; that would be his idea.

Q. You say, I believe, that Judge Davis stated that he was going to the sound for the benefit of his health?

A. Yes, sir.

Q. Did he say anything about whether he thought it would improve it or not; that was his purpose in going?

A. That was his purpose in going, to see if it wouldn't.

Q. Was Judge Davis familiar with the by-laws and regulations of the bank there?

A. Well, I should think he was; I don't know. That is something I couldn't say, whether he was or not.

Q. He acted as president in the meeting of the directors and stockholders? A. Yes, sir.

Q. He seemed conversant with its by-laws, did he not?

A. I should think so.

Q. Wasn't he a man that would, from his characteristics, naturally investigate such matters and post himself thoroughly upon it? A. I think so; yes, sir.

Q. That would be his inclination? A. Yes, sir.

Q. A man of clear mind, wasn't he; pretty clear?

A. Yes, sir.

Q. And good business qualifications?

A. Yes, sir.

Q. Frequently called the attention of the directors to the by-laws and their application to matters that came up, did he not?

A. Yes, sir; I think I heard him do so.

Q. What kind of ink and pen did you have on that table at that time when the deed was signed and the conversation took place?

A. I couldn't say what kind it was.

Q. Black or blue or what?

A. Well, I can't say that. The document can tell whether it was black or blue, but I haven't got it with me.

Q. It was probably an ordinary inkstand and a steel pen?

A. That is what I think it was. I don't think it was anything else.

Q. What time of day was this when this transaction occurred? A. It was in the night, sir.

Q. You think it was in the night also when he signed the deed?

A. Yes, sir; I am satisfied it was in the night when he signed it. We used to go down there and stay there till ten or eleven o'clock, and sometimes we would go away before that. If we thought he was getting tired and wanted to go to sleep and wanted to rest himself,

we would slip out earlier. It was all nightwork that we did over that.

Q. Do you recollect how long before this it was that Judge Davis had been down to the bank?

A. Do I remember how long before this?

Q. Yes.

A. Oh, it must have been quite a while since he had been at the bank; I couldn't say now as to the length of time but he had not been in the bank for quite a long time.

Q. Sometime before? A. Some time before.

Q. Can you fix it anywhere near any particular date?

A. I don't think he had been in the bank for two or three weeks.

Q. Two or three weeks before this occurrence?

A. Yes, sir.

Q. You stated, I believe, that you can't remember the exact date when he returned?

A. No; I couldn't do that.

Q. Have you anything that you can refresh your memory from as to that date?

A. I don't know that I have or any way that I can refresh my memory.

Q. What was his condition within a day or two after his arrival or return from his trip to Tacoma?

A. It was very bad.

Q. What was his condition, mental and physical, say the next day or the day after that?

A. After he came back?

Q. Yes.

A. Well, he was in a condition that he was not fit to

walk across the floor without help. I was almost afraid to see him undertake it for the first day or two after he came back.

Q. What was his mental condition at that time?

A. He appeared to be clear the first day or two.

Q. But after that?

A. After that it was not; no.

Q. He would not be competent to know anything?

A. No; he would probably talk for a minute or two all right and ask me about the mines and how they looked and so on, and in a minute from that he would be all shook up again.

Q. You spoke about the keys of this little tin box which enclosed the bank stock there. Do you know who had possession of those keys prior to this time?

A. I think Judge Davis always had it.

Q. Did you ever see anybody else have them?

A. No.

Q. Did you ever see him have them prior to that day?

A. Yes, sir; I have seen him open that box before.

Q. Do you remember about how often?

A. I think I saw him open it two or three times to my knowledge.

Q. Can you say whether you know if he left those keys with Andy frequently?

A. I don't. I think he always kept them with himself. I don't think that he ever left them.

Q. Do you know whether he did frequently leave them with Andy? A. That I can't say.

Q. You don't know? A. No.

Q. After his return from the coast did you see those keys at any time? A. No; I never saw them.

Q. Never saw them after that? A. No.

Q. This box was then, as I understand you, returned to the vaults of the bank? A. Yes, sir.

Q. By whom was that returned to the vaults of the bank?

A. Well, I didn't go right to the bank with Andy that night, but he had it and went to the bank and I suppose he put it in.

Q. He went there for that purpose?

A. Yes, sir.

Q. Have you seen that box frequently since?

A. Yes, sir; I have the box in my possession now.

Q. You say that you have not had possession of that stock, either as executor or otherwise, since that time?

A. No, sir; I haven't.

Q. You never had possession of it in any way prior to that time, did you? A. No, sir.

Q. In other words, you mean to say that Andy took possession of it and kept it? A. Yes, sir.

Q. And this suit is simply to try who is entitled to the possession of it? A. Yes, sir.

Q. I will get you to state whether you were a witness here on a former occasion, on a trial where the question of the ownership of this stock came up, for the purpose of ascertaining whether or not it should be credited as assets of the estate of Andrew J. Davis.

A. I was; yes, sir.

Q. You were sworn as a witness there, Mr. Talbott, were you? A. Yes, sir.

Q. And you gave in your evidence at that time?

A. Yes, sir.

Q. Can you remember about the date at which you gave in your testimony, Mr. Talbott?

A. The date that I gave it in then?

Q. Yes, sir; as near as you can get at it.

A. Well, it was the time that I gave it in—it was the time that the administrator question was up there.

Q. Can you recollect about what date it was?

A. I couldn't say now.

Mr. TOOLE.—We will ask the clerk to give us that date.

The STENOGRAPHER.—It was from April 19th to April 24th, 1890.

Q. Was it some time from the 19th to the 24th of April, 1890—about that time? A. Yes, sir.

Q. Were you interrogated at that time by Mr. Forbis, attorney for John A. Davis, and by Mr. Myers, attorney for Mr. Root and others, in reference to this matter of the gift of the stock? A. Yes, sir; I was.

Q. Were you asked this question, Mr. Talbott: "Where do you reside?" and did you answer it, "At Butte city, Montana"? A. Yes, sir.

Q. Were you asked the question, "How long have you resided here?" and did you answer it, "Since the winter of 1875, I think"? A. Yes, sir; that is right.

Q. In answer to the question, "Did you know Andrew J. Davis, now deceased, in his lifetime?" did you answer that you did? A. Yes, sir.

Q. In answer to the question, "How intimately?" did

you answer in substance, "I have been doing business with him pretty near for ten years or nearly twelve"?

A. Yes, sir.

Q. When asked when you were in his employ, did you say, "Some of the time"? A. Yes; I think I did.

Q. When asked what was the character of your employment under Andrew J. Davis, did you answer, "Managing agent of his mines"? A. Yes, sir.

Q. When you were asked, "Were you or were you not quite intimate with him"? did you answer that you were?

A. Yes, sir.

Q. When inquired of as to whether you knew Andrew J. Davis, Junior, did you answer, Yes?

A. Yes, sir.

Q. Mr. Talbott, here is a question propounded to you. I will read it and your answer: "I would like to call your attention to an occurrence between Andy J. Davis, Junior, and Judge Davis, deceased," a question by Mr. Forbis, "with reference to a conversation in which Judge Davis made certain gifts to Andrew, and I will ask you to state if you remember that conversation"; to which you answered, "I think I do; yes, sir." Is that correct?

A. I think it is.

Q. You were asked the question, Where was it? and in answer you said, It was at his house where he lived—Judge Davis' residence? A. Yes, sir.

Q. You were asked whether it was in this city and you answered, Yes, sir, did you? A. Yes, sir.

Q. You were asked then, and I call your attention closely to this, "State what occurred," and you answered, "Just before he started for Tacoma, going down on the

coast, I went there for seven or eight days. I had some business with him, and we were down there, Andy and I, different times in that seven or eight days before he left. With regard to this gift that he gave Andy in regard to this stock of the First National Bank, he had a box there, and he took the stock out and looked it over and gave it to Andy. He said he didn't know whether he would ever come back or not; there might be an accident on the railroad. We told him we thought that he would come back—that he would live ten or fifteen years." Is that your statement there?

A. That is right; yes, sir.

Q. You were asked then, "Andy told him that?" and you answered, "Yes, sir; and I did the same. He said the train might jump the track and might kill him, and he said, 'If I don't come back or anything happens I want you to have that.'" Is that your language?

A. Well, that is about the sum and substance of it—that he wanted him to have the stock.

Q. "At that time what was the condition of Andrew J. Davis, deceased?" and you answered, "I think it was poor. His physical condition was poor." Is that correct also?

A. Yes, sir.

Q. "Was he ill at that time?" and your answer was, "Yes, sir." That is correct, is it?

A. Yes, sir.

Q. You were asked, "What was he going to Tacoma for?" and you said, "He thought it might improve him." Is that correct?

A. Yes, sir.

Q. You were asked, "What did he do towards delivering this stock to Andy?" and you answered, "He gave

the stock to him; put it over to him across the little table." Is that correct? A. Yes, sir.

Q. "What was Andy's condition at that time, mental and physical?" Your answer is, "He was sitting at the table in a chair and had this tin box there."

A. Yes, sir.

Q. "The young man?" "Yes, sir."

A. Yes, sir.

Q. You were asked, "Have you detailed pretty much the conversation?" You answered, "I think about what transpired." A. Yes, sir.

Q. On your examination by Mr. Myers this question was asked you, was it: "Mr. Forbis asked you why the Judge was going to Tacoma, and you answered that he thought it would do him good. How do you know he thought so?" You answered, "I don't know that he thought so. We thought so, and he did, too." Is that correct? A. Yes, sir.

Q. "Did he say so?" You answered, "Yes, sir; he did. He said when he was down there before with Judge Knowles and Dixon it did him good, and he was going down to see if it wouldn't do him good again." That is correct, is it? A. Yes, sir.

Q. "What were his words, as near as you can recall them?" You answered, "He said he was going down the coast; that it did him good before and he was going down to see if it wouldn't do him good again. It was the best place that he had found in all of his travels." Is that correct? A. Yes, sir.

Q. You were asked if he returned from there, and you said that he did? A. Yes, sir.

Q. What you stated there is correct, is it, Mr. Talbott?

A. Yes, sir; that is about the substance of it.

Q. To the best of your knowledge?

A. To the best of my knowledge; yes, sir.

Q. And that is a correct statement of what transpired?

A. Yes, sir.

Q. It was given by you shortly after the gift, which was some four or five years ago. This testimony was given soon after the transaction occurred?

A. Yes, sir.

Q. And you would be more likely to remember then what transpired, would you not?

A. Well, if I say anything to-day any different it can't be much different, because it is all in the same meaning—the same idea. I can't see where it would make any difference particularly.

Q. Well, you were called to give his language as near as you could, and you did it, didn't you, to the best of your knowledge and judgment?

A. Yes, sir.

Q. Mr. Talbott, there is one thing. You think that Judge Davis left for this trip on the 27th of December, '89?

A. No; I wouldn't say on the 27th. I think that would be the night before and he would leave the next day, and that would be the 28th.

Q. Well, I mean this gift was made on the 27th?

A. Yes, sir; that is what I think.

Q. Now, where was the Judge prior to that time, in this city?

A. Yes, sir; he was in the city. From the time he

came back with Mr. Dixon and Knowles he was not away anywhere.

Q. Do you know how long he was in the city of Butte here before this gift was made, Mr. Talbott?

A. He must have been here—if I knew the time that he came back from below I could tell pretty close, but I don't know how long he was gone down there. It would be anyhow 30 or 40 days and maybe 50 days, but I couldn't say positive as to that.

Q. Do you know what time it was that he was down at Tacoma with Mr. Dixon and Judge Knowles?

A. I know he was down there before September?

Q. You know it was before September?

A. Yes, sir.

Q. He never made any trip down there between September and December 27th?

A. No, sir; he was here. He didn't make any trip after that.

Q. You know he was here during all of October, do you?

A. I am satisfied he was; yes, sir.

Q. And all of November? A. Yes, sir.

Redirect Examination.

(By Mr. DIXON.)

Q. Who was John E. Davis, Mr. Talbott?

A. He was a son of John A. Davis.

Q. A brother of Andy? A. A brother of Andy.

Q. You speak about this writing desk or table on which you say this deed was signed and at which the party was seated when this conversation took place. What room of the house do you say that room is in?

A. It is in the north end of the house.

Q. The back end of the house?

A. Yes, sir; the back end.

Q. Is it a writing-desk or a table?

A. It is just a little table. I think it has got round corners, if I recollect properly. I know it is a very small table.

Q. In the testimony that has been read to you that you gave on the hearing with reference to the propetry of the estate, do you consider that you gave any different account of this transaction from what you have given here to-day?

Mr. TOOLE.—We object to that.

(Objection sustained. Defendant expects.)

Q. Did you on that former examination state everything that occurred?

A. No, sir; I didn't state everything.

Q. Have you upon this examination stated everything that occurred, as well as you could remember?

A. I think so; everything that would be connected with the case. There were little things came up there talking about different things, but nothing about that gift or anything.

Q. You stated in your former examination, as read to you, that Judge Davis said that something might happen to him—the train might run off the track. How did he come to make that remark?

Mr. TOOLE.—We object to that; incompetent.

(Objection overruled. Plaintiff excepts.)

A. The reason was that we told him, you know, that we didn't think—tried to brace him up and make him

think that he was not so bad off, you know, and then it was that he said the train might jump the track and he get killed that way. He said, "You are taking chances all the time when you are on a train," or something to that effect. That was how that came about.

Q. When you were called to testify upon this prior hearing, Mr. Talbott, did you know that you were going to be called before you went on the stand?

A. No, sir; I did not.

Mr. TOOLE.—We object to that; immaterial, irrelevant, and incompetent.

(Objection overruled. Plaintiff excepts.)

Q. Had you on that occasion or prior to your being called on that occasion given any particular thought to that matter? A. No; I hadn't; not a thing.

Q. If there is any difference in the statement that you gave on your testimony before and that you have given now, which would you say was correct?

Mr. SANDERS.—We object to that; incompetent and irrelevant.

(Objection overruled. Plaintiff excepts.)

A. Well, I think that the statement I gave to-day is as near correct as I could give it, then or any other time. I don't see how I could better it any. There might be a word here and there that would mean a little different, but at the same time it all means the same to me when I come to put it all together.

Recross-Examination.

(By Mr. TOOLE.)

Q. There may, you say, have been some things transpire that you did not testify to on the former trial, but what facts you did testify to on this former trial are correct, are they not—the facts?

A. Well, I should say that they were; yes, sir.

Q. While you might not have remembered some things that you testify to now, what you did testify to then is correct? A. Yes, sir.

And it being conceded on the trial of this cause that the said defendants had the affirmative, the following testimony was introduced to support the issues joined by the pleadings herein on their part:

JAMES A. TALBOTT, plaintiff in this action, being introduced as a witness on behalf of the defendants, testified as follows:

I am the plaintiff in this action and special administrator of the estate of Andrew J. Davis, deceased, and reside in Butte city, Montana, and have resided there since 1875, and am engaged in mining. I am acquainted with the institution known as the First National Bank of Butte and have been acquainted with it since it first opened, say 12 or 15 years. I have occupied the position of director and for the last three years have been president in that bank. I have been a director eight or nine years, possibly 12 or 13 years, since the bank opened. I am now vice-president. I know Andrew J. Davis, commonly called Judge Davis, and know when he died, which was on the 11th of March, 1890. He died at his residence

on East Broadway, in Butte city, Montana. I had been acquainted with him since 1864, and was very intimately acquainted with him for the last 18 or 20 years; was connected with him in business, in milling, I think, about seven or eight years before he died, probably 12 years or very near. Judge Davis was president of the First National Bank of Butte at the time of his death.

I am acquainted with Andrew J. Davis, one of the defendants in this action. I have been acquainted with him about 12 years; it might be a little more. I did not know him before he came to Montana. I have known him very intimately for the last eight or nine years. He is cashier, I would say about three years probably, say three or four years. He had been employed in the bank before that; in fact, ever since he came to the State, probably for 12 years; for the last twelve years, I should think. Andy managed the business of the bank for the last two years or thereabouts before the Judge's death. Andrew was a nephew of the Judge.

Whereupon the following interrogatory was propounded to the witness:

Q. Did you at any time hear Judge Davis say anything as to the business capacity or character of Andy Davis, or as to his (Judge Davis') affection or liking for him? If so, when and what did Judge Davis say?

Which said question was objected to by counsel for plaintiff as incompetent and immaterial, and which said objection was overruled at the time and duly entered in accordance with the statute in such case made and provided.

And in the argument of the said question E. W. Toole,

of counsel for plaintiff, limited his objection thereto, "more particularly in so far as it applied to the business capacity of the said Andrew Davis"; which objection was likewise overruled by the court, and to which ruling the said plaintiff, in due and proper form and in accordance with the statutes in such case made and provided, excepted.

A. The Judge thought there was nobody like him as to his business qualifications. Pertaining to the bank and so on, he always thought he could not place anybody like him. He always spoke of him as a good business man and just the man he wanted there and had to have, and that he was lucky to have him there. He spoke of this matter to me many different times. He spoke of it the last year of his life, and I know he talked of it in 1889 more than once—a great many different times. He always spoke to me of Andy as a father would of his son. He felt that way apparently from his talks with me. He felt proud of him. This occurred frequently.

And the said defendants propounded the following question to the said witness:

Q. Did you at any time before the 27th or 28th of December, 1889, hear Judge Davis say anything as to what disposition he intended to make of the First National Bank of Butte, or his stock in it, in case of his death? If so, when and what did he say?

To which interrogatory counsel for plaintiff objected for the reason heretofore stated and for that it is incompetent and inadmissible, as the validity of this gift depends exclusively upon what transpired and what was said at the time it was made.

Which objection was by the Court overruled; and to which ruling of the court the plaintiff then and there duly excepted and had the same entered in accordance with the statute in such case made and provided.

A. I heard him say that he never intended the bank to go in his estate; that he had always intended that for Andy, and that was what he expected to do with it.

This was after the fire at the bank, as near as I can recollect, and that was in September, 1889, when he talked to me about that. I think it was across the street—when he moved across after the fire. I heard him say that at different times. I saw Judge Davis about the 27th or 28th of December, 1889, and was present at that time that the conversation had occurred between Judge Davis and Andy relating to the stock of shares in the First National Bank of Butte owned by Judge Davis. It was sometime between the 27th and 29th of the month of December, 1889. I cannot give the date any more particularly. I had some papers signed on the 27th of the month. It was but a few days before he went away, and he left before New Year's. It is between the 27th and 29th and after dark. There was present at this conversation Andrew Davis, Judge Davis, and myself. There may have been others in the house, but cannot say others were in the room. I don't remember of any one else being there. The way I came to go up to Judge Davis' house was this: We had been for seven or eight days there settling, and Andy was with us all the time, and whether we wound up everything on the 27th or not as to our business I don't recollect positively, but it was the night he signed this deed; a deed, I mean, of some prop-

erty that he deeded to me. When I reached the house that evening there was nobody there but Judge Davis. Andy came in afterwards. He brought with him a box; an iron or tin box it might be called. It was a painted box and a box that belonged to the Judge. I had seen it before that time. It was generally kept in a vault of the bank. I did not know particularly what it contained until that night. Judge Davis kept the key to it. At the time of this conversation Judge Davis' health was poor. He had not been in good health for four or five or six months. He was in very bad health. He had not been well for a year or more and worse than commonly before this.

Here the witness was asked the following question:

Q. State what, if anything, you heard Judge Davis say prior to the time of this conversation as to his expectation of recovering his health.

To which interrogatory plaintiff objected for the reason that it called for a declaration prior to the time of the gift touching his health at that time; which objection was overruled and exception duly taken and entered in accordance with the statutes in such case made and provided.

A. Well, he even said to me that he did not never expect to recover from it; that he was too old to get over it; could not overcome the disease.

He spoke that way frequently. I took him buggy riding frequently, and he would say to me that he was too old to handle this disease that he had. He was about 70 years old when he died, and this conversation was the year before. I think he was close to 70. His mind was

sound at the time of this conversation, and I think he could transact business as good as he ever could in his life, as far as I know. I had had quite a settlement with him and do not think that he overlooked anything. I had business with him right up to this date. I don't know of him transacting business with anybody else. The business I had with him was with reference to money that I owed him on a sale of the mines, being a settlement of accounts between him and myself, which extended over about seven years and seven or eight months, and included many different items and matters and covered considerable money. I cannot say positively whether the deed was signed on the same day of the settlement or not, nor whether it was signed on the same day of the conversation. His mind was all right as far as I could see. I think his mind was perfectly sound. From the business I transacted with him I should not think otherwise. He might become a little tired, and it took a little longer to make the settlements. We would not be there more than three or four hours in the evening, and then we would let him have a rest when he would get tired, and we would say to him that we would let it go to the next day. He would get a little tired, but was all right. This had been going on for seven or eight days, during all of which time we talked about our business affairs every day, and the matter was finally concluded between us on the day this conversation occurred or the day before, I am not sure; think it was the 27th. The conversation to which I have referred between Andy Davis, Judge Davis, and myself was this: He ordered the box fetched down the day before. Now, that might have been the 27th when

he ordered the box. He said, "When you come down tomorrow, fetch my box down," and he told me to come down too. I came down ahead of Andy and was there in the room before Andy came down, and Andy came down later on, and the Judge was down below in the kitchen or down in the dining-room below, and he came up after Andy came. I am not sure whether Andy went down after him or not, but anyway he came up, and then he went to look at these papers in the box and pulled the papers out on the table. I mean the Judge did this, and looked round them awhile and finally said, "Where is all of this? This is not all. There is something is not here." And it appeared he got them all pulled out together and did not get them all. I mean the shares of the bank stock. Andy told—he guessed they were all there, and he pulled the papers over and looked at them and found the missing papers, and figured it up and said they were all there. Andy is the one that did this. It was the stock of the First National Bank of Butte. Andy figured it up and told him, "That is all; it is all here." "Well, now," he says, "there is fifty shares in the directors' hands." Then he commenced going over the directors and he came down to Hauser, and it appeared as if Hauser had nothing there. He had nothing there to represent from Hauser. I mean nothing to show how Hauser held the stock. So he said to Andy, "You write to Hauser and see that he signs a contract, and do it right away." Then the stock was all right, and it was understood to be 950 shares. Andy counted it up, and there was 950 shares outside of what the directors had. Andy passed them over to the Judge after he figured up

and showed him what there was of it, and he passed it back again, and he said, "I have always intended that for you, you take it." After the Judge had received it from Andy he passed it back over to Andy when he said this. He said, "I have always intended that for you, and I want you to take it." Andy took it, and I sat there and it was a kind of a surprise to me. I did not expect anything of the kind. I did not know what he did. I supposed he had his business or maybe would fix his business in a different way, but he did that, and he said, "I always intended to do that and now I will do it." Andy picked up the stock and we commenced talking to him and telling him that we did not think that he was so ill. Andy put this stock in his pocket. We told him (the Judge) that we did not think he was seriously ill as he might think. "Well," he says, "I am an old man and there is no telling. I cannot stand what I used to. I do not think I can get over this disease." He says, "I cannot stand it. I am too old; I cannot expect it." As near as I can state just what he said with reference to his expectation to recovering was this. He just said that he did not expect he could. He said, "We might think it, but," he says, "don't. I only hope it will be so, but I don't think it." We told him that we thought he would if he would go down there and give his business up and not be bothering about it. We thought he might improve. He said that he did not think so, but that he was going to try it anyway, and he said, "I will get ready and go in the morning," and I think he went the next day after. When Judge Davis gave Andy this stock he put it in his pocket. I don't know what became of the key. I don't know and

I cannot say who kept the key. There were four pieces of stock. Andy figured up this stock. There were four certificates, I mean, of the stock. Andy had the stock in his hands when he figured up the stock. He handed them back to the Judge and the Judge handed them back to Andy. They were the same certificates. I never have seen them afterwards. I mean after this conversation. I never have had them in my possession as special administrator. I think Judge Davis left about the next morning after he gave Andy these certificates. He started to go to the sound and stopped at Tacoma. I believe that is where he stopped at.

And the said defendant propounded to the said witness the following question:

Q. State, if you know, from Judge Davis' declarations or otherwise, when he left Butte after that conversation.

Which question was objected to as incompetent and hearsay testimony and not touching any proposition upon which hearsay testimony is admissible nor a part of the *res gestae*.

Which objection was overruled, and to which ruling of the court the plaintiff then and there duly and properly excepted.

And in answer to the said question the said witness stated:

A. He said he went to see if he could not improve his health. John A. Davis, his brother, went with him. I don't remember the exact time when he returned. Andy came back with him. John A. Davis is dead. After the Judge returned to Butte he stayed at his residence until his death. He saw me the morning that he came back.

His health was worse. He was worse off when he came back than he was when he went away. He was considerably worse. I saw him every day after his return to Butte from that time on. He went down all the time from the time he came back. I don't remember how long it was after his return he died. It was probably three weeks, maybe four, but he died after he came back.

And the said witness, upon his cross-examination, stated substantially as follows:

I knew Judge Davis since 1864. My personal relations were friendly with him. I bought liquors from him and then afterwards we were partners in mining ventures. I have known Andrew since he came here—I think, about twelve years. He is cashier of the First National Bank of Butte and I am vice-president of it. I have held that position about three years. I have held it since the Judge's death, and was a director before Andrew held the position of cashier, before the Judge's death. I think either cashier or assistant cashier. Judge Davis, up to the time of his death, was president of the bank from its organization. I don't think he was a director; I am not sure, however. Andrew and myself have been on good personal relations ever since I have known him. We have been interested in some little purchases, like the purchase of mines, locating them or patenting them, or something like that; we are partners in mines, but are not operating them; we have been partners or joint owners in these mines I don't think over four years. I suppose Andrew has had charge of the bank as cashier, together with the directors, who have acted with him since the Judge's death in directing him what he should

do and what should be done and so on, and advising him with regard to such things as that. I don't think we have any examining or discount committee; the directors attend to that branch of the business, I think. We are also interested in a corporation down in the Flathead country—that is, he is interested in some of it and I am interested in the same corporation, but we don't hold our stock jointly. When Mr. Hyde was there and cashier of the bank he used to sign the drafts, and afterwards, when Mr. Davis became cashier, I suppose he signed them. The president did not sign them unless the cashier was not there; he might do it then, just as I do it now as vice-president. All the time the Judge was there he acted in the capacity of president. There has been stockholders' meetings held since the 27th day of December, 1889. There was one held at the regular date after that time. I suppose it was held on the 14th of January. The Judge was not at any meeting after the 27th of December, 1889; he was represented at that meeting by John E. Davis, his proxy. The day before the gift the Judge directed Andy to fetch down that box of his, and it was brought down the next day. I fix the date of the gift by reference to a deed executed by the Judge to myself; it was executed down in his house. He had a little room, front room, office, with a writing stand or table in the center, and this deed was executed at this little stand. He signed it there. At the time Judge Davis gave this stock he was sitting like Mr. Dixon was sitting at the corner of the stenographer's table, I was sitting about this way, and Andy was sitting about where the stenographer is; we were all around the small little table; it is not as large as

the stenographer's desk. Andy figured up the stock, no one assisted him in doing it, and the box was placed on this little writing stand, the same upon which the deed was signed. These certificates of stock were there unfolded and examined. The stock has a blank assignment on the back of it for signatures. I think that this gift was made on the 27th, because he signed the deed on the same night the stock was given on the table. He signed the deed before he gave the stock. I don't know whether it was signed the day before or on the same night. This deed may have been signed at the time we had this conversation. At the time the Judge gave Andy this stock he did not make any written assignment or sign the blank assignment of it on the back of the stock. The room and writing desk I refer to at which we were sitting at the time this stock was given was in the back end and not the front end of the house. His bed and all were in the same room. It was the last room he ever used in the house. I was acquainted with the business habits of Judge Davis. I have had a great deal of business with him one way or another in the last eight or ten years before his death. His habits with respect to fixing up business in a business-like way and consummating things in a business manner, I used to think he was pretty apt to do. I don't think he would leave anything undone when he undertook to finish up his business about business matters. He was apt to consummate things in a pretty good shape so as to leave no question about it. He was a very particular man to see that things were done up in shape that there could be no contention about it; that is what he always aimed to do, sir. A man would think if he

want to get anything done from him when he got done he would think he wanted to have it fixed up just right. A man would think that he was especially that way in making certain and absolute so there could be no question about it afterwards; that would be his idea. He stated that he was going to the sound for the benefit of his health. It was his purpose in going to see if it would not improve him. I should think Judge Davis was familiar with the by-laws and regulations of the bank. I don't know that he was, and it is something that I cannot say. He acted as president in the meetings of the directors and stockholders and seemed conversant with its by-laws, I think. He is a man who would naturally investigate such matters and post himself, I think; that would be his inclination. He was a man of clear mind and good business qualifications; would frequently call the attention of the directors to the by-laws and their application to matters that came up. I think I have heard him do so. I cannot state what kind of pen and ink was on the table at the time the deed was signed and at the time the conversation took place. The document will tell whether it was black or blue, but I haven't got it with me. It was an ordinary inkstand and steel pen. The transactions was at night. I think it was at night when he signed the deed; I am satisfied that it was at night when he signed it. It had been a long time before the Judge had been in the bank before this conversation or gift occurred. I cannot state how long; two or three weeks or more. A day or two after his return his condition was very poor; was not able to walk across the floor without help. I was afraid to see him undertake it for the first day or

two after he came back. His mind was clear the first day or two after his return; after that it was not. He would not be confident to know anything. I think prior to the death of Judge Davis he had possession of the keys to this little tin box. I don't know that I ever seen anybody else have them. I had seen him have them before that day. This little tin box was after that returned to the vaults of the bank by Andy, I suppose; he went there for that purpose. I have seen the box frequently since and have it now in my possession. I mean to say that Andy took possession of the bank stock and kept it, and that I have not had possession of it, and that this suit is simply to try who was in possession of it. I was a witness in the former trial, where the question of the ownership of this stock came up for the purpose of ascertaining whether or not it should be credited as assets of the estate of Andrew J. Davis. I was sworn there as a witness and gave in my evidence; it was from April 19th to April 24th, 1890, or about that time. I was interrogated by Mr. Forbis, attorney for Mr. John A. Davis, and by Mr. Myers, attorney for Mr. Root and others, in reference to this matter of the gift of the stock to Andy. I swore I resided in Butte City, Montana, and that I had resided there since the winter of 1875; that I knew the deceased in his lifetime; that I had been doing business with him for ten or twelve years, and stated that I was in his employ some of the time, and that I was managing agent of his mines; that I was quite intimate with him; that I knew Andrew J. Davis, Jr. I testified that I remembered the conversation in which Judge Davis gave to Andrew Davis the bank stock; that it occurred at the resi-

dence of Judge Davis, in this city. I testified that just before he started for Tacoma, going down on the coast, I went there for seven or eight days. I had some business with him, and that we were down there, Andy and I, different times in that seven or eight days before he left. With regard to this gift that he gave Andy—in regard to this stock of the First National Bank—he had a box there, and he took the stock out and looked it over and gave it to Andy. He said he did not know whether he ever would come back or not; there might be an accident on the railroad. We told him that he thought he would come back, and that he would live ten or fifteen years. That is what I testified to then. It was Andy who told him that he thought he would come back and would live ten or fifteen years, and I did the same. He said “the train might jump the track and might kill him,” and he said, “If I don’t come back or anything happens I want you to have that.” That is what I testified to; that is about the sum and substance of it—that he wanted him to have the stock. I also testified at that time that his physical condition, I thought, was poor. I also testified that he was going to Tacoma because he thought it would improve his health. I also testified that in so far as delivering the stock to Andy was concerned, he gave the stock to him; put it over to him across the little table. I also testified that I detailed pretty much the conversation, and that that was what transpired. Mr. Forbis asked me whether the Judge was going to Tacoma, and I answered that “He thought that it would do him good”; that we thought so, and he did, too. He said, “When he was down there before with Judge Knowles and Dixon it

did him good and he was going down to see if it would do him good again." He said, "It was the best place he ever found in all his travels." I also testified that Mr. Davis returned. What I testified to on that occasion is correct and is about the substance of it, to the best of my knowledge. It is a correct statement of what transpired. It was given by me shortly after the gift, which was four or five years ago. If I have said anything to-day any different it cannot be much different, because it is in the same meaning, the same idea. I cannot see where it would make any difference particularly. I was called on then to give the language as near as I could and did it to the best of my judgment.

On redirect examination the witness testified:

The little writing desk referred to is just a little table; I think with round corners. I mean the one where the deed was signed and is in the north end of the house. I did not state on the former testimony everything that occurred. I think I have done so this time—everything that would be connected with the case. We had told that to Judge Davis, trying to brace him up and make him think that he was not so bad off, and it was at that time that he said the train might jump off the track and he get killed that way. He said, "You are taking chances all the time when you are—the train," or something to that effect. That is how he come to say that the train might run off the track or something happen to him.

At the time I gave my former testimony I did not know what I was going to be called for; I had not given any particular thought to the matter.

And thereupon the witness was asked the following question:

Q. If there is any difference in the statement that you gave in your testimony before and that which you have given now, which would you say was correct?

Which question was objected to by plaintiff's counsel as irrelevant and incompetent, and which objection was overruled by the Court; to which ruling of the Court plaintiff then and there duly excepted in accordance with the statute in such case made and provided.

To which question the witness answered:

— Well, I think that the statement that I gave today is as near correct as I could get it then or any other time. I don't see how I could better it any. There might be a word here and there that might mean a little different, but at the same time it all means the same to me when I come to take it altogether.

On cross-examination the witness testified as follows: There may have been some things transpired that I did not testify to on the former trial, but what facts I did testify to on the former trial are correct. They were facts. Well, I might have remembered some things that I testified to now, but what I did testify to then is correct.

ANDREW J. DAVIS, being called as a witness, and being the defendant in this action and called for the purpose of testifying with reference to facts that occurred during the lifetime of the said deceased and with reference to conversations had with him, his competency as a witness was objected to by the plaintiff under section 647 and 646 of the Compiled Statutes of the State; which objections was sustained.

CONRAD KOHRS, a witness on behalf of the defendants, testified as follows:

That he lived in Deer Lodge, and lived in Montana since 1862, and that he was intimately acquainted with Andrew J. Davis since 1894; that he met him often and was on very friendly terms with him, and knew him in Butte ever since he resided there and commenced his mining operations. His relations with him were intimate and pleasant. I had no business transactions with him until 1882, since which time he had frequent business transactions. I am acquainted with the association known as the First National Bank of Butte and have known it ever since its organization, and know the defendant, its cashier, Andrew J. Davis, and have known him about ten years. Here the following interrogatory was propounded to the witness:

Q. State, Mr. Kohrs, whether or not you ever heard Judge Davis say anything as to the business capacity or character of Andy Davis or as to his, Judge Davis', affection or liking for him. If you did, when and what did Judge Davis say?

To which interrogatory, and especially the former portion thereof referring to the business capacity or character of the said Andy Davis, and also the latter portion thereof referring to the affection or liking for him by the deceased, the same objection was interposed as had theretofore been interposed to a similar question propounded to James A. Talbott; which objection was overruled by the Court, and to which ruling of the Court the plaintiff then and there duly and properly excepted, and which exception was duly and properly entered in accordance with the statute in such case made and provided.

To which question the witness answered as follows:

A. Well, he always told me that he thought that Andy was a good boy, and that he had a good deal of confidence in him, and that he was a good business man and very capable in the position that he had at that time.

I have heard him say that several times before he dies. I used to go often to the Judge's rooms and spend the evening with him. The Judge had been to Europe and was telling me a good deal about his trip to Europe. He spoke of him (Andy) and said he filled the place better and was more of his own stripe. The old Judge was very close, you know, and I think that Andy is as close a business man, and for that reason he liked him and he said often that he would do something for him at that time. I heard him make these remarks very frequently, and the Judge always regarded him as a close business man.

Whereupon the plaintiff called the attention of the Court that it was the desire of plaintiff that it should appear that all of this testimony goes in under objections to the original question; to which Mr. Dixon, attorney for defendant, consented, and which was so ordered by the Court.

And thereupon the following question was propounded to the witness:

Q. Did you at any time hear Judge Davis say anything about what disposition he intended to make of the First National Bank of Butte or his stock in the bank in case of his death?

To which question plaintiff objected for the reason that it is incompetent, immaterial, and irrelevant, and for the reason that the facts and statement at the time of the alleged gift must control it independent of such declara-

tions and be sufficient within itself to constitute a gift causa mortis.

Which objection was by the Court overruled, and to which ruling of the Court the plaintiff then and there and at the time duly excepted in the manner hereinbefore set forth; which said exception was thereupon entered in accordance with the statutes in such case made and provided.

The witness further testified that the Judge had been to Europe, and some time in July, 1889, down at his house in Butte, his private residence, I spent an evening with him there. He spoke of going to Europe again, and desired me to accompany him on the trip and proposed to pay my expenses. He said, "I intend to make another trip to Europe, and before I go I am going to give the bank to Andy." That is what he stated and this is the way the conversation came about. Here plaintiff moved to strike out all of the witness' statement with reference to what the deceased intended to do with the bank or bank stock, for the reason that it was based upon the condition that he got to Europe and for the reason that he did not go; which motion was overruled and exception duly taken and entered in the manner and form aforesaid.

Continuing, the witness said: Shortly afterwards he again told me that he wanted to call in all of his outside business, and that he had intended to give the bank to Andy. He was anticipating at the time of going to Europe that fall.

Here plaintiff moved to strike out said answer for the reason last stated herein; which motion was overruled by the Court, and to which ruling of the Court plaintiff

then and there duly excepted and had the same entered in accordance with the statute in such case made and provided.

DANIEL W. DILLINGER, a witness on behalf of the defendants called, testified as follows:

That he was a resident of St. Paul, Minnesota, and that he resided in Butte City up to 1886, and that he had resided there since the spring or summer of 1876; that he knew A. J. Davis, commonly called Judge Davis, in his lifetime, and knew him since 1876 up to the time of his death. After leaving Butte City I visited that place about twice a year, and I was intimately acquainted and friendly with Judge Davis. I roomed at the bank and associated with him most every day when in town. I commenced rooming at the bank in 1883 and roomed there off and on up to 1886. I know the First National Bank of Butte and have known it since 1876. I know Andrew J. Davis, commonly called Andy Davis. He is defendant in this action. I have known him since 1880 or '81. I roomed with him from 1883 till 1886.

Here the following question was propounded to the witness:

Q. Did you at any time hear Judge Davis say anything as to the business capacity or character of Andy Davis or as to his, Judge Davis', affection or liking for him? If so, when and where and what did Judge Davis say?

To which question the same objection as heretofore was interposed, and the same order of Court overruling the same was made, and to which ruling due and proper exceptions were taken by the plaintiff.

To which question the witness answered:

A. I did. It had been mentioned quite often. He said that he was in *the* fact the only nephew that he had that amounted to a damn outside of John, and he said John had no force. He said he was going to try and make a banker out of him, and that it was his intention to give him the bank. He had a great liking for Andy. He used to want me to check up on Andy. If I had I might have been committing myself. I did not know what he meant by that. This occurred on a great many occasions from 1883 to 1886.

Q. Did you at any time hear Judge Davis say anything as to what disposition he intended to make of the First National Bank of Butte or its stock in case of his death? If so, when and what did he say, and under what circumstances did any such conversation occur?

Which question was objected to by the plaintiff for the reason set forth in the objection to a similar question propounded to Conrad Kohrs in that the gift *causa mortis* could only be established by what transpired at the time the gift was made, and that whatever may have been the intention upon the part of the deceased to do at the time of his death is incompetent as tending to establish a gift *causa mortis*; which objection was overruled, and to which ruling of the Court the plaintiff then and there in due form of law excepted.

A. In a month of December, '85, we were on our way to the city of Mexico by way of New York—that is, Judge Davis and myself—and he said that he thought that it was a great mistake that Mr. Hyde and myself had not purchased the bank which we had been talking about

doing. He said as long as we had not it was his intention to give the bank to Andy in due course of time. He told me this in the strictest confidence at the time. In 1889, some time in the fall, I came to Butte to adjust a loss, having property in the same block as the bank which had been burned. They were then doing business across the street from the present location, and I went in to interview the boys in the bank, and talked the kind of a building they were going to put up. I went to the Judge's office to talk with him, and suggested that if the bank was only one story Andrew would have no place to sleep.

The Judge had stated that he intended to put up only a one-story building, because he could make it strictly fireproof. After I had suggested that Andy would have no sleeping room he hesitated a moment and said he had not thought of that, and it was perfectly right that Andy should have sleeping-rooms, as the bank belonged to him. "If you have time we will go up and see John and see if it can be changed from one to two stories." We went up and asked John the question, and he said, "Yes; I can run it up six stories if you want, and he said,—while, "As the bank belongs to Andy, you will put him in a set of rooms, bath-room and everything complete." That was all the conversation, and in occurred in '89.

Whereupon the plaintiff moved to strike out all the testimony of said witness as incompetent and immaterial; which motion was overruled by the Court and exceptions then and there properly taken in accordance with the statutes made and provided.

GEOFFREY LAVELLE, a witness on the part of the defendant, also testified:

I reside in Butte; have lived there since 1875; knew Andrew J. Davis, commonly called Judge Davis, since 1873 up to the time of his death I was slightly acquainted with him up to the fall of 1875, in Butte. I had a good deal of business with him in a business way. I banked with his institution for a number of years from the time it started. I think one year after the S. T. Hauser & Co. bank started I have banked with that institution, and am acquainted with the First National Bank since its organization and have known Andrew J. Davis, commonly called Andy, since '72.

Here the following question was asked by defendants:

“Did you at any time hear Judge Davis say anything as to the business capacity or character of Andy Davis or as to his, Judge Davis’, affection or liking for Andy; and, if so, when and what did Judge Davis say? State the circumstances of the conversation.”

To which question plaintiff then and there duly objected for the reason hereinbefore stated; which objection was overruled by the Court and exceptions then and there properly and duly taken; and the witness in response to the question said: I met Judge Davis in San Francisco in 1887, at the Palace Hotel, and in conversation with him about young men generally who were doing business in Montana he referred to Andy as being a capable young man—the best in the Davis family—he and John, particularly Andy, as competent, and that he had a bright promise for the future. He said nothing about his affections for Andy, but seemed to think a good deal of him, so far as I could judge from his conversation.

The latter portion of which answer, respecting the wit-

ness' opinion—moved to strike out; which motion was sustained by the Court.

JOSEPH BROUGHTON, being a witness for the defendants, also testified:

I live at Walkerville, in Silver Bow county, and have lived there 13 or 14 years; was acquainted with Judge Davis during his lifetime; knew him 10 or 11 years; was rather intimately acquainted with him in a business way also, havng done my banking business with him. We were quite familiar with one another. He would ask me down to his house once in awhile and we would have disputes and agreements, and so on. I am acquainted with the First National Bank of Butte, and know Andrew J. Davis, commonly called Andy, and have known him, I think, 9 or 10 years.

Q. Did you at any time hear Judge Davis say anything as to the business capacity or character of Andy Davis or his, Judge Davis', affection or liking for Andy? If you did, state when and what you hear; tell us the circumstances of the conversation.

To which question plaintiff interposed the objection as heretofore.

Which objection was overruled and exceptions in the manner heretofore stated duly and properly taken and entered.

A. "He always spoke very highly of Andy, and had great confidence in him, and felt quite safe in leaving business matters with him and in his hands, and so on." I think this occurred two or three times at his house. It must have been six or seven years ago. It must be some-

where in '88 or '7; I don't like to be sure, but from that time on we were quite intimate.

Q. Did you at any time hear Judge Davis say anything as to what disposition he intended to make of the First National Bank of Butte or his stock in it in case of his death? If so state the conversation, when and where it was, and what was said and all the circumstances.

To which question the plaintiff then and there objected for the reason that the alleged gift *causa mortis* could only be established by the facts and transactions that occurred at the time it was made, and that the independent fact as to the intention of the said donor to give it at the time of his death was incompetent to establish such a gift, and that it was immaterial to such intention.

Which objection was overruled by the Court; to which ruling of the Court the plaintiff then and there in due form of law excepted and which exception was duly entered accordingly.

To which question the witness answered:

A. I have had conversation with him on that subject. The last conversation we had I remember it because we were in the bank at the time it was being rebuilt. He told me that he was not interested himself very much in building the bank; that Andy's father was superintending it, and that when it was completed and all there was belonging to it—

Whereupon plaintiff moved that the answer be stricken out, as it had no reference to the question of the gift in controversy in this action but referred to an intended gift at the time of the completion of the bank, which does not appear to have been executed.

Which motion was by the Court overruled.

To which ruling of the Court the said plaintiff then and there and in due form of law duly and properly excepted.

This conversation occurred, I think, in 1889. On another occasion I heard the Judge speak of this matter; it was prior to that, but I cannot give any date; I have nothing to go by, and I took no further notice of it than the conversation itself; but I remember well being in the basement of the bank; perhaps the year prior to the former conversation. I heard a conversation at his house, in which he said the bank would be Andy's; that he intended to give the bank to Andy. I had been joking him at the time and telling him that he had not long to live; that he could not steady his hand, and that he would soon be dead, and that he ought to make a settlement of those things before that time came, and so on, and that is how it came about. This is the import of what he said. I could not, of course, go into details.

W. W. McCracken, a witness on behalf of defendants, also testified:

That he lived in Butte and had lived there continuously since '86; was there prior to that time a few years and left again. I have been in the banking business ever since in Butte, and am in that business now in the Silver Bow National and am president of it. I knew Judge Davis during his lifetime; was personally acquainted with him since the fall of '80, probably, and knew him by reputation a great many years prior to that, and know the First National Bank of Butte; was in its employ as bookkeeper, I believe, in January, '83, and stayed with it up to September, '83. I think in the latter part of

August, '86, I returned and was in the employ of the First National Bank of Butte continuously until, I think, in March, 1890, or perhaps February, 1890. I left—to the Judge's death, probably a few days before. I was very intimately acquainted with him and very well acquainted with young Andrew J. Davis, commonly called Andy, very intimately, and have known him since I returned to Butte in August, 1886. He was in the employ of the bank at the time I went back there.

Here the following question was propounded to the witness by the defendants:

Q. Did you at any time hear Judge Davis say anything as to the business capacity or character of Andy Davis or as to his, Judge Davis', affection or liking for Andy? And if you did, state when and where and what you heard him say about the matter.

To which question the same objection and ruling of the Court and exceptions to the ruling of the Court were had as heretofore stated.

A. On enumerable occasions from the time I went there last—in '86 until I left there I very often heard him say—indeed it was almost a daily conversation and subject of conversation. He would talk about the business in general and frequently, times without number, said in fact that the bank was Andy's and he considered it Andy's and wanted it so considered. On several occasions I remarked that there was giving the boy a good deal of money and the Judge would say that he was not giving him much—a hundred thousand dollars and what it earned. He did not look at it that he was giving him more than one hundred thousand dollars. I spoke to him

several times about making the dividends and getting rid of the undivided profits, and he said, "No; I will never do that. I will—take a cent out." He said it all, this was bearing on matters having reference to Andy, in regard to the amount of what he proposed to give Andy.

By the COURT.—Well, just take what he said with reference to Andy.

By the WITNESS.—The Judge told me, in other words, that the bank was to be Andy's when he was gone—it was Andy's; the whole business—all of the capital stock of the First National Bank.

(By Mr. TOOLE, counsel for plaintiff.)

Q. When he was going where?

By the WITNESS.—Well, when he was dead. That was the idea—when he was gone. He wanted it understood by me that the entire business was to give everything. He did not specify that there were just so many shares or how many shares of stock was to go, but the entire bank was to be Andy's.

By Mr. DIXON.—What did you ever hear Judge Davis say with reference to Andy's business capacity and character?

A. He had a very high opinion of him. He said he was a bright young man and was intellectual and honorable, honest, and industrious.

CHARLES ELTINGE, a witness on behalf of defendants, testified:

I reside in Butte and have resided there since '81; am in the insurance business and have been engaged in the banking business here; was with Clark Brothers from

'81 to '89, or Clark & Laribie most of the time. I know the institution called The First National Bank of Butte; been acquainted with it since I first came to Montana, in '81; knew Andrew J. Davis, commonly called Andy, and have known him since '81, and have known Judge Davis since I first came here. I met him almost every day. My duties called me to The First National Bank every day, at least, and I met them in that way.

Q. Did you at any time hear Judge Davis say anything as to the business capacity or character of Andy Davis or as to his, Judge Davis', affection or liking for Andy? If you did, state when and where it was and what the Judge said and the circumstances of the conversation.

To which question the attorneys for plaintiff interposed the same objection as heretofore, and the same ruling was made thereon by the Court and the same objection duly taken.

A. In '88 I think it was. I remember one talk I had with him, though there were conversations besides that. I was called to the bank one afternoon after the doors had closed at three o'clock to make the exchanges, and it often happened that I was there a half an hour or so with nothing to do, waiting for the other clerks to get their business done, and would engage in conversation with the Judge. At the time I speak of Andy was sick and at the springs. The Judge said he had a very high opinion of Andy, and thought that he would make a good banker in time. This happened several times, but this particular time I remember because Andy was sick. In this conversation he remarked that he had a very high opinion of Andy and that he was progressing nicely.

Q. What did you hear Judge Davis say at any time as to what disposition he intended to make of The First National Bank or his stock in it in the event of his death?

To which the same objection, the same ruling of the Court, and the same exceptions to the ruling of the Court were made.

A. This time he told me he intended to give Andy the bank and he hoped that his sickness would not amount to anything, because he wanted him to be well before taking charge of it; because he wanted before he dies—he intended to give him the bank; he wanted him to be a healthy man; that was about his idea.

J. E. GAYLORD, a witness on behalf of the defendants, testified:

I have lived in Butte and have resided here since the fore part of '83, and am manager of the Parrot Silver & Copper Company. I know The First National Bank of Butte and have known it since '83, and knew Andrew J. Davis, commonly called Judge Davis, during his lifetime. I became acquainted with him in February, '83, and knew him up to the time of his death. I was quite well acquainted with him and had business transactions with him since that time during his life. I know Andrew J. Davis, commonly called Andy. He is my son in law. He has been my son in law since September or October, 1890.

Q. Did you at any time hear Judge Davis say anything as to the capacity or character of Andy Davis or as to his, Judge Davis', affection or liking for Andy? If you did, state when and where and the circumstances of the conversation and what the Judge said in reference to it.

To which question the same objection was interposed and the same rulings of the Court overruling the same and exceptions to the ruling of the Court had and taken as heretofore.

A. I have heard him frequently express his confidence in Andy's application to business and business integrity and pleasure, with the manner in which he was taking hold of the business, on more than one occasion, once particularly before, I remember, in September, '87.

Q. Did you ever at any time hear Judge Davis say anything as to what disposition he intended to make of The First National Bank of Butte or his stock in it in case of his death?

Same objection, ruling of the Court, and exception as as heretofore.

Q. (Continuing.) State when and where and what he said.

A. In September, '87, I had some business with the Judge, and he then stated that Andy would have the bank. There was some other conversation at the time and he expressed his satisfaction with the manner in which Andy had conducted matters in the bank. These statements were had on a number of times.

On cross-examination the witness stated the words he used were, "That the bank would be Andy's." He did not state when it would be Andy's. His words were, "That the bank would be Andy's."

He never said anything about when he intended to make the gift nor on what conditions he intended to make it. He just generally stated that it was his purpose to give it to him.

His words were, "That the bank would be Andy's."

He did not say what disposition he would make of this bank on his death. I don't remember that he spoke of his death. The remark came about in this way: I had some business with him and he told me he wished Andy to fully understand all the business of the bank and the transactions, and he called Andy into the bank-room at that time and explained the business to him; the transaction I was having with the bank or was about to have. I went out and called him in myself at the request of the Judge.

GEORGE A. TONG, a witness on behalf of defendants, testified as follows:

I am now living on the Big Hole river; formerly lived in Butte City; came there in '75. I lived all the time up to the last summer and this winter in Butte; am engaged in mining. I know the institution called The First National Bank of Butte, and have known it ever since it started; knew Andrew J. Davis, generally called Judge Davis, during his lifetime, and knew him for five or six years before he came over here, and knew him ever since he came here, up to the time of his death. I did all my banking business with him and was well acquainted with him. I lived right behind him in his office in Butte. I sold him the lot on which he lived. I used to go over there pretty near every evening. I know Andrew J. Davis, generally called Andy, and have known him since '86; before that, even. He was there a couple of years while Mr. Hyde was cashier.

Q. Did you at any time hear Judge Davis say anything as to the business capacity or character of Andy Davis or as to his, Judge Davis', affection and liking for Andy? If

you did, state when and where and what Judge Davis said about these matters.

To which *ruling* the same objections, ruling of the Court, exceptions were had and taken.

A. I used to go in there, of course, every morning, and where we were not talking about business the old Judge used to ask my opinion. He thought a good deal of Andy, and used to ask me if I did not think he was a very nice boy lots of times. I don't know what time this was. It was both before and while Mr. Hyde was cashier.

Q. Did you at any time hear Judge Davis say anything as to what disposition he intended to make of The First National Bank or his stock in it; if so, where and what did he say?

To which the same objections, ruling of the Court, and exceptions were had and taken.

A. He said that he was going to give it all to Andy. He told me that at least a dozen different times through Mr. Hyde's administration, and up to the last time I ever saw him; maybe not the last time, but along about there.

Here the deposition of D. L. Balch, Charles F. Mussigbrod, and William H. Heald were offered in evidence.

To which the same objections to similar interrogatories as those heretofore, and the same rulings of the Court were made, and the same exceptions to the rulings of the Court aforesaid then and there duly and properly taken and entered by the plaintiff,

A deposition of WILLIAM H. HEALD, so offered as aforesaid, is as follows:

My name is William H. Heald; I am 30 years old; reside at Wilmington, Delaware, and my occupation is na-

tional bank examiner. I was a national bank examiner during the year 1889; was acquainted with Andrew J. Davis, generally called Judge Davis, of Butte, Montana, and first knew him in August, 1889, and I knew him from that time until his death. I first knew him as president of the First National Bank of Butte. Afterwards our acquaintance was somewhat of a personal nature, outside of his connection with the bank. I knew him as president of the First National Bank of Butte in 1889. I have been acquainted with Andrew J. Davis, generally called Andy, since August, 1889, and up to the fall of 1892. I met him several times a year and know him personally and socially outside of his connection with the bank. He was cashier of the First National Bank of Butte during the entire time of my acquaintance with him. He is known as the nephew of Judge Davis. I know the First National Bank of Butte and knew it during the years 1889 and 1890, 1891, and 1892, during which time I was examining the national banks in Montana.

Q. State whether you ever heard Judge Andrew J. Davis say anything as to his intentions with regard to the said First National Bank of Butte and to the said Andrew J. Davis, the defendant, or as to what disposition the said Judge Davis intended to make of said bank or his interest therein. If you did hear him say anything about these matters, or any of them, state as near as you can when and where it was, and how he came to say anything about these matters, and what he said and what was said by anyone else. If you heard the said Judge Andrew J. Davis say anything in relation to these matters on one or more occasions, please state fully the occasion, circum-

stances, when and where you heard him say anything about these matters, what he said, and how the conversation between you and he occurred, if any such there were, and who was present at any such conversations.

To which question the plaintiff then and there objected; which objection was overruled by the Court, and the same exception to the ruling of the Court taken and entered as hereinbefore set forth.

A. On August 12th or 13th, 1889, I was sitting in the back room of the First National Bank building talking to Judge Davis, and, among other things, we were discussing Andy Davis, and I stated to the Judge that the—for Andy were great and for such responsibilities he was not getting much money. The Judge replied, "That will be all right, as Andy some day will get the bank, anyway." Afterwards, in October, 1889, I saw Judge Davis at his house in Butte City. His health at that time was failing, and in the course of general conversation he repeated the conversation of August previous, that Andy should have it all when he, Judge, was gone. At neither time was anyone present but ourselves, although, in October, D. A. Flowerree was with him part of the time, but not when we were talking on that matter. I know nothing more.

E. E. BALCH, a witness on the part of defendants, testified as follows:

I am the assistant cashier of the Omaha National Bank, and had a general supervision of the outside banks connected with the bank during the year, and traveled a good deal over the west, including Idaho, Washington,

Oregon, and Montana. I knew the institution known as the First National Bank of Butte; knew Andrew J. Davis, commonly called Judge Davis; knew Andrew J. Davis, commonly called Andy Davis; knew them in Butte, Montana, during the year 1886; knew them by meeting them at the bank. I knew the Judge about three years before his death. I had no business relations with him, except as business came up between the two banks—I mean the bank of which he was president—the First National Bank of Butte—and the bank I represented in Omaha. I was out several times between 1886 and 1889, and generally saw him while there; saw him sometimes on business matters and sometimes socially. I have known Andy ever since the bank commenced doing business. Judge Davis was president of the bank and Andy cashier.

Here the same objection, ruling of the Court and exceptions to the ruling of the Court with reference to interrogatories pertaining to the same matters as hereinbefore had were had.

I met Andrew J. Davis some time during the month of November, 1889, on the same boat, going from Tacoma, Washington, to Victoria, at which time I talked with him relative to the stock of the First National Bank of Butte. We were together nearly all of one day on the boat referred to, and he told me during the conversation that his health was very poor, and that he had started to take a trip to Japan, hoping to improve by the sea voyage, but that he did not know whether he would be able to continue or not, as he was feeling very poorly. We talked over the business of his bank several times during the day, and during the conversation he stated that — had

built that bank up by his own personal efforts, and had made it the best bank in Montana, and had a great deal of pride in it, and had trained his nephew Andy to the business, so that he could take sole charge of the bank after his death, and when he got home he expected to give over control of the bank to him. I asked him if he intended by that to give the stock of the bank owned by him *and* Andy, and he said that was his intention; that Andy should eventually be the manager of the bank, and that he should leave his stock in said bank to him. He talked over this matter several times during the day, and told me twice that he intended leaving to his nephew when he died the stock held by him in the First National Bank of Butte.

CHARLES F. MUSSUGBROD in his said deposition testified as follows:

My age is seventy-nine years and three months, and my residence is Warm Springs, Deer Lodge county. I was acquainted with Andrew J. Davis, generally called Judge Davis, during his lifetime, and think I first knew him in 1865 and knew him continuously up to the time of his death. We were on very friendly terms. I am acquainted with Andrew J. Davis, generally called Andy, and have known him ever since he came to Montana. He is a nephew of Judge Davis and was always in the bank with Judge Davis. I know the banking institution known as the First National Bank of Butte and have known it ever since it started.

Q. State whether or not you have heard the Judge, Andrew J. Davis, say anything as to his intentions with

regard to the said First National Bank of Butte and to said A. J. Davis, defendant, and as to what disposition the said Judge Davis intended to make of said bank or his interest therein. If you did hear him say anything about these matters, or any of them, state, as near as you can, when and where it was and how he came to say anything about these matters, and what he said, and what was said by anyone else at that time.

To which the same objection, same ruling of the Court, and same exceptions to the ruling of the Court as heretofore were had and taken.

A. Yes; I had a conversation with Judge Davis. The first of August, 1888, Andrew J. Davis came down to the springs—I mean young Andy—and he was at that time a very sick man. He remained in bed until the 16th of August, on which time I came up to Butte. While walking along Main street here old Judge Davis stood in front of the bank and called me in. He asked me, “Well, when will that boy be able to come up?” My answer was, “He is a very sick man. He is worked out and has not the constitution to work in your bank from morning till night.” Judge Davis remarked then, “Oh, well, Dr., you know that—that we all had to work when we were young, and especially if a man works for himself.” My remark was then, “Judge, as far as I know, he is not working for himself, but for you, and at very small wages at that.” Then the Judge says, “Andy knows very well that that bank will belong to him some day.”

That is all I can say about it, and that is every word that was used.

CHARLES S. WARREN, a witness on the part of the defendant, testified as follows:

I have lived in Butte 17 or 18 years. I know the First National Bank and its officers, and have known it ever since its organization; knew Andrew J. Davis, generally called Judge, since 1866, and had charge of his business here for a number of years, from '77, more or less, up to his death, and saw him very frequently. I know Andrew J. Davis, the defendant, commonly called Andy, and have known him since he came to Montana.

Q. Did you at any time hear Judge Davis say anything as to the business capacity or character of Andy Davis, or as to his, Judge Davis', affections or liking for Andy? If you did, state when and where, and what you heard the Judge say about these matters.

Same objections, ruling, and exceptions.

A. About a year, or perhaps a year and a half, before Andy came to this county Judge Davis told me that his brother John had a son named after him, who was cashier or collector of the "Chicago Times," and that he was going to have him come out to this country. In fact, I talked to him two or three times before Andy came here. He said that he was about 16 or 17 years old. I asked him what he would do with him, and he said he would put him in the bank, and if he showed a disposition to become a banker, or ever became one, that he would bring him up in the bank and give him a working interest in it. Before Andy came here he said he had been to Chicago, or had been to New York and stopped off at Chicago, and seen Mr. Story, of the "Chicago Times," about the boy, and he referred him to the business manager, and

he said he gave him a good name, and he thought he was the brightest of his brother's sons, and being named after him, he wanted to do something for him. I have talked with him often about his business qualifications, and I used to come down to his place on business matters and he was always very inquisitive about other people's business as well as his own.

Generally discussed everybody, but talked about Andy. He said he was getting along nicely and just such a man as he had long needed. This was during the years from '84 up to near the time of his death.

Q. Did you at any time hear Judge Davis say anything as to what disposition he intended to make of the First National Bank stock or of his stock in it; and, if so, what did he say, when and where, and what were the circumstances of the conversation?

Same objection, same ruling of the court, and exception.

A. He said he had established the First National Bank of Butte and he wanted to build it up as the leading bank of the State, and he wanted it to remain in the Davis family and in the Davis name and under Davis management, even after his death. I never heard him say that he expected to die; that was the farthest from his mind, but he said "He expected the bank to fall to Andy when he did die."

The inference I got from him was that he expected, under his management, to control the bank until he died, when it should go to Andy. That was the substance of it.

Here the defendants introduced also the inventory and

appraisement in the matter of the estate of Andrew J. Davis, deceased, for the purpose of showing the value of the estate outside of this bank.

Which was objected to as immaterial.

Which objection was overruled and said inventory admitted.

To which ruling the plaintiff then and there duly excepted.

Which said inventory, supplemental inventory, and appraisements, marked Exhibits "A" and "B"—admitted in evidence.

And which said inventory and supplemental inventory showed the estate of said deceased, aside from the stock of said bank, to be to the value of two million four hundred and eighty-nine thousand three hundred and ninety-three and eight-hundredths (\$2,489,393.08) dollars, Said inventories did not include the bank stock in controversy in this action, nor two hundred and sixteen thousand (\$216,000) dollars of bonds and ninety thousand (90,000) shares of the stock of the Butte and Boston Mining Company, nor eight hundred (800) acres of improved land in Davis and Van Buren counties, Iowa, the same not having come to the hands of the administrator of said estate.

Hon. HIRAM KNOWLES, judge of the circuit court, ninth circuit, for the district of Montana, a witness on behalf of the defendants, testified as follows:

I reside in Missoula, Montana, and am United States district judge for the district of Montana, and have resided in Montana since August, 1869; was here in 1866, but left for a time. I have been continuously in Montana since 1868. I was acquainted with Judge Andrew J.

Davis in his lifetime; got acquainted with him some time long about '70; might have known him before. I knew Judge Davis before I came to Montana. The last five or six years of his life I was quite intimate with him; perhaps as intimate as anybody was with him. I was his attorney during the last 6 years of his life. I remember the time of his death, but cannot say exactly when it occurred. It was about March 11th, 1890, as suggested by counsel. I know that he was sick here in February, but I could not have told exactly the date that he died. I was acquainted with his physical condition prior to his death. When he came home from what he called the sale of his Silver Bow property—I don't remember just when it was—he was very much out of health. He was not very well before that time; was very sick afterwards and remained out of health. I know personally and from others and from what he told me that he was taking medicine all the time—that is, every day or two; he was taking medicine after that time. A few months before his death, in November, Mr. Dixon here was sick and had some damaging symptoms at that time. I had known Mr. Dixon from boyhood, and I proposed to him in November, 1899, that we go to Puget Sound. I wanted to go to Puget Sound, and I thought that was the best thing for him to do, so as to get out of this altitude. I went to Judge Davis and told him that I was going with Dixon. I had some papers to make out for him in a lawsuit, and as soon as I named it he said he wished to go along, and I said all right. I didn't know at this time that he was much out of health until we made this trip, when I ascertained he was troubled with insomnia very much, and on

the road from here to Tacoma he slept very little. He had the annex of the state-room; Mr. Dixon and his wife had the state-room, and we had the annex. Judge Davis slept in the lower berth and myself in the upper berth. I would often find him up in the night, and he would get up sometimes before I would, when he would get up and dress himself and sit on the side of the bunk below. When we got to Tacoma he would not go anywhere, and even to his meals, until I went with him, and I found that he was very feeble at that time. Then we went from there to Victoria, and I think we stayed in Victoria eight days. Mr. Dixon and his wife and Judge Davis and myself took a ride every day we were there, I think. I don't think there was a day we did not take a ride, and I thought he improved some. He got uneasy and wanted to leave there after he had been there three days, but I told him I thought he was doing pretty well. He was continually taking seidlitz powders, and we tried to get him to change from taking seidlitz powders to porter. After drinking a couple glasses of porter we considered that that would not do and went and got him a drink—half-and-half and he tried that for a few days and then quit and would not drink any more. I remember one incident: The sun had come out. It had been raining most of the time we were at Victoria, and he started off for a walk. The sun was shining bright and we went with him, and we went about a half a mile straight out from the Draiad house, and the old gentleman came very near giving out. He had to sit down where the board walk was up some distance; we had to stop and sit on that board walk, and when we got back he went and laid down

on his bed and claimed that his meals were sour and so on. We left there and went back to Tacoma, and I think we stayed in Tacoma 3 days, when we went back; I think we went up to Shelton. I had not slept very well and I came back, and the night I came back he was sick in the night. He rang the bell for my room, but I did not wake up and he came and woke me up. I went into his room and he was in considerable pain with his stomach, and I think—I don't know whether his bowels were in order or not, but his stomach. I got some medicine for him. I think I got some pepper-mint down at the bar, and I went and stayed with him that night, and he was quite feeble and he wanted to go back to Montana right away, and would not wait another day. I think that there had been an agreement while I was gone, and he was determined to go right back to Montana. We came back from here and I thought he was better, but he seemed soon to go down again. I should say it was mostly nervous derangement which caused this physical disability. Of course, part of this I can only tell from what he told me, and that is that he did not sleep. He would not sleep only one night in three, and he worried about little things. I remember sending down one morning and he had been awake and thinking that some one was going to swindle him that he had trusted, and he had not slept all night. I said, "What in—is the matter? Supposing you had lost fifty thousand dollars?" He said, "It don't make any difference whether it is fifty thousand dollars or two hundred and fifty dollars. I will worry about it just the same. I cannot keep from doing it. My mind is not subject to

my control at all about the matter." I was a pretty busy man in court in those days and had a lot of business in Deer Lodge, and I think he had seen Van Sant. Then he got a notion that he would like to go to the south of France and stay awhile and he offered to pay my expenses if I would go with him. I told him I could not go, there was no use talking, and then it was finally agreed that he should go to Mexico. I recommended that for the reason that he would see a different kind of people as well—have a change of climate. He would see different houses, different roofs on the houses and I thought that would distract him, and my understanding was, when I went to Deer Lodge that he was to go to the city of Mexico. We got back to Butte in December—about the 1st of December. We were eight days, I think, in Victoria, and at the time we got to Tacoma we stayed there two or four days. Then we spent a day going to Victoria and a day coming down, and then must have been as much as three days at Tacoma coming back. Then there was the time we were traveling to and from Tacoma. Well, altogether I would say we were there nearly three weeks. I have not looked at the dates or anything of that kind. We got here in December I know, because of the court at Deer Lodge. I had to be there. Think after he came back here in a day or two he got down just the same as he had been before we went down there. I was with him whenever I was there. Most always he would see me at the bank or send for me for some little thing to come down to his house. Sometimes it did not amount to anything and sometimes it was a matter of business. I would say that he declined or went back just as he was

before—sleepless nights and all and in about the same condition taking medicine every day or so. I was not here at the time he left on his last trip. I met him in Deer Lodge on his return. He must have returned some time along in February—about the 1st of February—from his second trip. It was about a month before he died. When I saw him in Deer Lodge he had failed considerably. Of course, we were in the cars and he talked very low, and it was with difficulty that I could understand his talk in the cars. I had to get right down to him. He seemed glad to see me and talked a good deal. His mental condition, I thought, was perfectly sane. I thought I saw him in Butte after his return from Tacoma the second time, in February. I came up with him from Deer Lodge, and he seemed feeble and very low. He kept talking to me a good deal, but I don't think I understood all he said to me coming up. I went with him to his room that night with Andy Davis, and he said to me, "I want to see you to-morrow," and I went to see him the next day. His physical condition was bad. He had lost ground since I had seen him. There were some days he would think he was liable to die in a very short time, and other days he would think he was liable to live as long as his father. He used to always cite how old his father was when he died. His father was 84 years old, I think, and he did not see why he could not get over his sickness and live as long as his father. He had a sort of belief that he had inherited a long life, and it was one day one thing and another day another. At this time when he went up to Tacoma and some time before that he was all the time trying to straighten up his affairs, as he

claimed, and fix up everything in the bank. He would go into the bank and take out the bills payable to the bank and look over them and examine them all, and those that he did not think were just right he wanted them fixed up. He wanted everything fixed up, he said. That was before he went to Tacoma and afterwards. He did not state to me for what reason he wanted them fixed up. You must remember that Judge Davis was a remarkably reticent and secretive man about himself and his affairs. He was a very good talker about other people's affairs, but he was a very secretive man about his own affairs and about himself. I did not see him just before his departure for Tacoma, in December. I know Andrew J. Davis, commonly called as Andy, and have known him ever since he came into the bank. I don't remember just when that Judge brought him on.

Q. Can you state, Judge, the opinion of Judge Davis, of Andrew J. Davis, Junior, as to his business capacity and as to his affection towards him?

Same objection, ruling of the Court, and exceptions to the ruling of the Court.

A. Well, he was accustomed to talk long the last about Andy, as he always called him, his business capacity, and in a very characteristic way. He would pump me as to my opinion about him, and then he would compare him to himself. He would say, "Now, I was just a little fellow just like Andy, and he will come out all right."

This was owing to the fact that Andy's father was all the time saying, "Andrew, you are killing Andy. You are putting too much on him, and you are going to kill him." The old Judge would say, "You just let that boy

alone; he has got more business sense than you have got. Now, just let him alone; he is coming out all right." Of course, I know he had a good opinion of his business capacity or he would not have put him in as cashier of the bank. "As to his affection, I think that Andy is the only person that I ever knew Judge Davis to exhibit any particular warmth or affection towards. He was a man that had few friendships, and Andy was one of his particular favorites. If he was sick he was always uneasy. He was sick in the bank here once. He had a room in the bank, and the Judge would go in and look at him, and he would not say anything particular to him, but he would rush right off and see the Dr. and ask him about what he thought of Andy and ask if he was very sick or something of that kind, and he seemed to feel differently towards Andy than to any one else that was around him."

Here the witness was permitted to testify with reference to such matters as he did not consider professional or that he had obtained in a professional way, subject to the objection, ruling of the court, and exceptions as heretofore.

A. Judge Davis was quite sick, and I had gone in there and talked with him about his trip and his health, and he said, "I wish to make some presents." He went on and stated that he wanted to know if I thought he was sound enough in mind to make these presents, and he had a long talk about any probability about his going insane, and I went on and discussed with him what I had read on these subjects of insanity and brain diseases. The conversation was probably an hour long, and in this

conversation about the presents he first said he wished to give ten thousand dollars to the public library of Butte, Andy wanted him to, and he understood that Charlie Larabie had given ten thousand dollars, and he wanted to give ten thousand dollars to meet that. Then he said there was a lady here whose husband had helped him considerably, and he wanted to make her a present, though he said he had paid him for everything that he had done, that he asked, but he wanted to make her a present. He said something about W. E. Wehtsraur's little girl, but exactly what was said about that I don't remember. Then he said there were two persons in the States that he wanted to make presents to, and in this conversation he said, "Andy is to have the bank, or control of the bank." I don't know which now; or he might have said both. That was all that was said particularly about Andy in that conversation—that is, as far as that matter is concerned. The balance of it led up the a legal matter. The interview was to be renewed. He was not to attend to any business or go up to the bank or anything of that kind. and in three days from that time I was to be there and we would straighten up his affairs. I went back at the second time. At that time he was insane. He would have done anything that I said. He would have signed any paper or anything like that, but he was out of his head, discussing business in a very philosophical way, giving his views about running banks and everything of that kind, and how they should be run, some of which views I think would be pretty good for some men to follow now.

Q. In this conversation with reference to Andy did he say that he wanted to give the bank to Andy?

A. He did not. He said, "Andy is to control the bank," or "to have the bank," and I think he may have said both, because this conversation was fully an hour long, and I don't know but more. He never was sane afterwards, and died of this illness.

Q. What have you to say with reference to Judge Davis dying with the same illness that he had there up to your trip to Tacoma with him?

A. While that is really in the line of a medical question, if you should ask my judgment about it, I should say that that disease started on his return from the sale of the Silver Bow properties to Butte and Boston company.

When he came back it was a week before we could find out what he had actually done, and I had to write a letter to Mr. Beaman, of New York. Before I had got that letter he had straightened out and he told me that he had had a chill somewhere in New York at that time, and he came back very feeble. He never gained his strength after that time. That was after he came back. I don't remember the day. I think it was about a year before his death.

Cross-Examination.

(By Mr. TOOLE.)

Q. This conversation that you refer to in which he spoke of giving Mrs. Wehrspau's daughter something, and also to the library ten thousand dollars, and also something to the lady here, and also that Andy was to have the bank or control the bank, was after his return from Tacoma, was it?

A. The last time; yes. It was his last trip to Tacoma.

Q. I believe you say that it was understood that you were to return within a few days and fix up these matters for him?

A. No; it was not to fix up those gifts exactly. The return was with a view of writing a will and fix everything in that way.

Redirect Examination.

(By Mr. DIXON.)

Continuing, the witness said: My object for returning then was to draw a will. That was the legal matter that came up. The other matter was my opinion as to his physical condition and capacity to make these presents that he was going to make.

(By the COURT.)

Q. I would like to ask the witness a question about his statement if there is no objection to it on the part of the counsel?

Consented to by all parties.

(By the COURT.)

Q. The statute provides that an attorney or counselor shall not, without the consent of the client, be examined as a witness as to any communications made by the client to him or his advise given thereon in the course of professional employment. The question I desire to ask is whether or not the statement which you say Judge Davis made to you with reference to Andy and the bank—in other words his statement that Andy was to have the bank or was to have the bank and control the bank—was

made in the course of professional employment by you with Judge Davis.

A. I did not so consider it, Judge, and I made no charge for it. I considered it was a personal matter, arising out of the personal relations that had existed. I may say it became very difficult along to the last in my intercourse with Judge Davis to distinguish between what would be personal and what would be a matter of attorney, because he came and talked to me about a great many things that pertain not at all to business, legal business, or required any looking up in legal matters. Now, the fact of his going with me down to Tacoma and I looking after him and everything of that kind could not be considered a legal matter, but a personal matter, and this interview with him I made no charge for, and I always charged him for everything. If I drew up a deed or a power of attorney or anything, I made a charge for that.

(By the COURT.)

Q. Do you know, from anything that he said, whether he considered that he was consulting you at that time with reference to this particular matter which I have inquired about in the capacity of an attorney or in the capacity of a friend?

A. No; he was consulting me, undoubtedly, in the capacity of a friend, to give him an opinion as to his mental capacity at the time to make these presents. It was not a legal matter; there was nothing said in any way, shape, form, or manner about how to make these presents. The truth is that I didn't want him. You may say that I was anxious that Judge Davis should fix up his

matters with a will at that time, and it led finally up to that proposition.

(By Mr. FORBIS.)

Continuing, the witness said: He did not ask me about a will or making any will, but it was about making these gifts, and whether I thought he was mentally capable of making these gifts.

By Mr. TOOLE.--We have no desire to interpose any objection to the testimony on account of the relation of attorney and client, and we withdraw all objections already made on that account.

By Mr. TOOLE.--We desire to ask Judge Knowles a question on our own part, and as he desires to go away, by consent of Court and counsel we will do it now. It is simply for the purpose of proving this proxy and having it identified by the witness.

Here the proxy of Judge Davis to John E. Davis was identified and was considered thoroughly identified for the purpose of being admitted in evidence by agreement of counsel.

Q. Take this proxy. Do you remember that meeting of the stockholders on the 14th of January, 1890? I mean the first stockholders' meeting that was held after Judge Davis left on his last trip to Tacoma?

A. I don't remember about the meeting, but suppose the minutes will show what was done and whether I was there. I am not sure that I was there.

Here the witness was handed the proxy of Judge Davis to John E. Davis, authorizing him to act as his proxy at any stockholders' meeting of the bank, and the witness stated that it was Judge Davis' signature to the proxy

and said, I am president of the First National Bank of Butte.

W. C. DARNOLD, being a witness for the defendants and being examined by J. W. Forbis, one of the attorneys for the defendants, testified:

I reside in Butte and have been here and in the vicinity of Butte for about 8 or 9 years, for the last six months. I resided here before coming here in 1883 and went to work for the First National Bank of Butte. I commenced on the 29th of August, 1883, and quit on the 26th of August, 1886. I was acquainted with Andrew J. Davis, commonly called Judge Davis, during his lifetime. I knew him from that date up to his death. I was in his employ for three years, just mentioned in the bank, and subsequently in his employ in connection with J. R. Boyce, Jr., and Company as bookkeeper. I was quite well acquainted with him. I remember his return from Tacoma in 1890. I saw him after his return and had a conversation with him relative to Andy and the First National Bank.

Same objections, same ruling of the Court, and same exceptions to the ruling of the Court entered as heretofore.

I made an application to him for a place in the bank, in which he told me, knowing that I was an enemy of Andy's—then, he says, well, I lost my position with J. R. Boyce & Co., and I says I was out of my position and out of money. The Judge had always been very favorable to me when I was in his employ and I thought I could get back in the bank, so I made application to him somewhere between the 1st and the 6th of Febru-

ary. At that time he told me that he had given the bank stock to Andy Davis and had not any control over it. Knowing that I was an enemy of Andy's, he said he could not do anything, but he said when he got up he would help me. He did not say he would put me in the bank.

(By the COURT.)

Q. When was this?

A. Some time between the 1st and the 6th of February, 1890.

(By Mr. FORBIS.)

Q. What was the Judge's condition at that time?

(By the WITNESS.)

A. He was very low, very weak. He could only speak two or three words and would keep quiet for a moment or two, and then would speak again, rather insinuating to me by what he said that I had better make my interview short.

Q. State what he said.

A. Well, he said he was not strong enough to talk much, and that he would do something for me when he got up, and then he subsided, and then did not say anything more.

It was just about the time of his return. It was a very few days after his return. It may have been 4 or 6 days. The interview lasted a few minutes, probably not over 15 minutes—10 or 15 minutes.

Cross-Examination.

(By Mr. TOOLE.)

Continuing, the witness said:

I don't know the dates; I only judge from the fact that my last work with J. R. Boyce, Jr., & Co. was the 31st of January, and it was after that time, because I was discharged but very shortly afterwards, because I made this application just as soon as I was discharged. I was in his house on Broadway. I could not say exactly what time—some time in the fore part of the month.

Q. You know if for the reason that you immediately after you ceased your employment with J. R. Boyce & Co.—you called there to see him with reference to this object that you wanted?

A. To this situation back in the bank again, where I had been. There was a lady there at the time. I think it was Mrs. Wehrspau; she let me in. I don't think she remained in the room at the time of this conversation. She may have been in, but I did not pay any attention to her until after I went in the room. The Judge had only been back here a few days, cannot say how long, when this conversation occurred; probably four or five days, maybe less. I don't know what time of day it was it occurred; it was during daylight. I am not sure whether it was in the forenoon or afternoon; cannot say whether it was after the shades of evening had come on, but it was during daylight—bright daylight—because it was not dark or anything of that kind. I think Mrs. Wehrspau was in there at the time the conversation commenced. I am not certain that it was Mrs. Wehrs-

paun. It might possibly have been her daughter or somebody else. He said he had given the bank stock to Andy or the bank business to Andy, and that he hadn't any control of the position that I asked for, but that he would do something for me when he got out.

He knew that Andy and I were enemies, you know. I don't know how long it had been before that that Judge Davis had been looking after any of the bank business. He had been gone for a long time. I think about the time he went away he was looking after the bank business—that is, he was in and out of the bank; possibly up to the time that he left. I, being employed about other business, did not know. Prior to my interview with Judge Davis I was in the employ of J. R. Boyce, Jr., & Co. I had been living in the family of Mr. Boyce. I had been stopping at Mr. Boyce's and sleeping there and eating there sometimes, and sometimes downtown. No one has been paying me anything to remain here. No one has been paying me anything for any purpose. Mr. Andrew J. Davis has not paid me a cent. I had not received anything from him; not anything at all. He has made no promise to pay me any money. I came back here to Butte about the middle of October—that is, when I came back here last. I have been engaged in on business since I came here; no business at all. I have not been enabled to get in any business. I have been just living with Mr. Boyce. I have not been able to get anything to do. I have always been a bookkeeper. I never told anybody else what had transpired. I never told Mr. Boyce or Mrs. Boyce what had occurred. I never mentioned it to them. I never said anything to them about

what I heard Judge Davis say in reference to that bank or bank stock. I never said anything to either one of them about it. I am positive about that. I had no recollection of doing so anyway.

Q. Did you have any conversation recently with Mr. Boyce or Mrs. Boyce about this matter?

A. Only in a general way—at the table and around the house, but nothing in which I said anything about what my testimony would be.

Q. Did you say anything to them about your testimony being the last and that it would be a clincher or something to that effect; that it was reserved to the last and that it would be a clincher?

A. I don't recollect saying it. If I had said it I would recollect it positively. I have no recollection of saying it.

Q. Would you recollect it if you had?

A. I think I ought to, but I don't recollect it.

Q. Will you say you did not say it?

A. No; I won't say I did not say it, because I don't recollect of saying it.

Q. Did you tell Mr. Boyce about expecting to receive anything for staying here? A. No, sir.

Q. Nothing of that sort? A. No, sir.

Q. Mr. Darnold, did anybody push you out of the house there at that time when you had this conversation that you speak of?

A. Push me out of the house? No, sir.

Q. Are you sure of that?

A. I am sure of that; nobody pushed me out of the house. My intimation was Judge Davis was not able to talk.

Q. Did you say to Mrs. Boyce that when you were having this conversation with him somebody pushed you out of the house? A. No, sir.

Q. Or out of the room? A. No, sir.

JAMES A. TALBOTT, plaintiff, recalled on behalf of the defendant testified as follows:

I am familiar with the stock of the First National Bank of Butte—the certificates, I mean. The certificates you hand me are certificates of stock of that bank.

Q. Do you know the signatures—A. J. Davis and A. J. Davis, Jr.? A. Yes, sir.

They are their respective signatures and this is the seal of the bank to them. There is some here, I see, that Mr. Hyde signed. These are the same certificates about which I testified upon yesterday. I testified upon yesterday that these certificates had a blank transfer assignment upon the back. I thought then they had, but see now that they had not.

Here the certificates offered in evidence by the defendant, being certificates of stock of the First National Bank of Butte—certificate No. 10,481 shares; certificate No. 14,343 shares; certificate No. 22,116 shares, all signed by Jos. A. Hyde cashier, and A. J. Davis, president; certificate No. 25, 10 shares, signed by A. J. Davis, Jr., cashier; Andrew J. Davis, president.

(Here insert the certificates of stock.)

If I testified upon yesterday that Judge Davis was in Butte from September until he went to Tacoma a day or two after the conversation between him and Andy about the stock, it was a mistake, because he went down with Judge Dixon and Judge Knowles between September and

that time. It must have been in October or November some time that he went down.

JOHN E. DAVIS, a witness on the part of the defendants, testified as follows:

I reside in Butte and have lived there since 1884; am a brother of Andrew J. Davis, the defendant in this action, and a nephew of Judge Davis. I attended a meeting in January, 1890, of the stockholders of the First National Bank of Butte and voted the stock as proxy for Judge Davis.

Looking at the proxy, the witness says; This is the proxy made out that time and which I voted. I voted it at that meeting and under the proxy.

Q. For an election of officers or directors?

A. Directors, I think.

Q. By whose direction or at whose suggestion did you vote for these officers?

By Mr. TOOLE.—We object as improper and incompetent.

By Mr. KIRKPATRICK.—We introduce this proxy for two purposes: to show that the date of it antedates the date of the alleged gift, and also to show that the actual domain of the stock was exercised by the beneficial and equitable owner of the stock, Andy Davis instead of, as the plaintiff claims, by the owner of the legal title.

By Mr. DIXON.—I would like to offer the proxy in evidence.

Which proxy was admitted without objection and is marked Exhibit "C."

PROXY.

“I do hereby constitute and appoint J. E. Davis, of Butte city, in the county of Silver Bow, State of Montana, my lawful proxy for me and in my name to vote nine hundred and fifty shares of the stock of the First National Bank of Butte, owned by me and standing in my name on the books of said bank, at the annual meeting of the stockholders thereof to be held for the election of directors on the fourteenth day of January, A. D. 1890, pursuant to law. I hereby ratify and confirm whatsoever the said J. E. Davis may lawfully do by virtue hereof, and I hereby revoke and annul all authority heretofore given by me authorizing any person for me or in my name to vote any of the stock in said bank.

In witness whereof I have hereunto set my hand and seal this 24th day of December, A. D. 1889.

(Signed) A. J. DAVIS.”

Objection to last question overruled; to which ruling of the court the plaintiff then and there duly excepted; which exception was duly and properly entered.

A. At Andy's.

By Mr. TOOLE.—I will ask that that answer be stricken out for the following reasons:

1st. There is no authority to vote the stock under the laws of the United States and the by-laws of the bank except that given by the deceased in whose name it stood upon the books of the bank.

2d. It does not appear that the attempted control of any one else or the assumption of the agent to act under

the proxy for any one else was known to or acquiesced in by the deceased so as to be binding upon him in his lifetime or binding upon his executors or administrators.

3d. Because the assumption so to act is based upon the declarations or request of A. J. Davis and not in the presence or hearing or knowledge of the deceased, and is not binding on him or his executors or administrators.

4th. It is not admissible as an act of Andy's on his own behalf, because inconsistent with the power conferred under which the act was done.

The said motion, being considered by the Court, was overruled, and to which ruling of the Court in not striking out the said answer and testimony of said John E. Davis with respect to instructions given him by Andy the said plaintiff then and there duly excepted, and his exceptions were duly entered according to law.

I never had any conversation with Judge Davis in regard to this proxy or any direction from him as to what officers and directors I should vote for under it. I received that proxy at the time of the meeting from Andy and voted it, and after I voted the proxy I handed it back to Andy. The body of the proxy is Andy's handwriting.

Cross-Examination.

(By Mr. TOOLE.)

It came into my possession at the bank at the meeting of the stockholders. That as the first time I ever seen it, It was given to me by Andy. I acted under this proxy. I voted the stock that stood in the name of Andrew J. Davis (Judge Davis) under this proxy. I suppose I voted 950 shares of stock, the same as the proxy calls for. I

voted just according to the proxy. I don't remember for whom I voted for president. I voted the way Andy told me to. I don't remember whether I voted for Judge Davis for president or not. He was not elected at that meeting. This was a meeting of stockholders, as I understand it. I don't remember whether I voted for him for director or not.

Q. This seems to have been filled in there with a kind of purple ink—that is, the name of John E. Davis. In whose writing is that? A. That is Andy's

Q. The signature of Judge Davis also seems to be in purple ink? A. Yes, sir.

Q. In different ink from the body of the instrument, is it not? A. Yes, sir.

Q. Do you know anything about when this proxy was really signed by Judge Davis? A. No, sir.

Q. Do you know whether it was signed in this town or Tacoma and returned here?

A. No, sir.

Q. The date of the proxy is in the same ink as the body of it, is it not?

A. I think so, yes; if I remember right.

The signature and filling in the name of J. E. Davis is in purple ink.

Redirect Examination.

(By Mr. DIXON.)

The body of the proxy is in Andy's writing. The name of J. E. Davis occurs in the body of it in two places in purple ink, both in purple ink and both in Andy's writing, so that the whole body of the proxy is in the same

writing, but my name is in different ink or different colored ink. My name in the proxy is written with the same ink as that of Judge Davis.

Here the defendants, having the affirmative of this case, rested.

Plaintiff offered in evidence the books and minutes of the bank—the deed mentioned by Mr. Talbott—for the purpose of getting at the date of the alleged gift, and the by-laws of the defendant bank were also admitted in evidence.

Which were as follows to wit:

BY-LAWS OF THE FIRST NATIONAL BANK OF
BUTTE, M. T.

Adopted at the directors' meeting held in September 12, 1881.

General Form of By-Laws.

1.

The regular annual meeting of stockholders of this bank for the election of directors and for the transaction of other legitimate business shall be held between the hours of ten o'clock A. M. and four o'clock P. M. on the day specified in the articles of association, viz., the second Tuesday in January of each year, and the thirty days' notice of the time and object of such meetings thereby required shall be given by the president, vice-president, or cashier, by publication in one or more papers in the city of Butte. The board of directors shall, within one month previous to the date fixed for such meetings, appoint three stockholders to be judges

of the election for directors, who shall hold and conduct the same and who shall under their hands notify the person acting as cashier of this bank of the result thereof as soon as ascertained and of the names of the directors elect.

2.

The person acting as cashier shall thereupon cause the return made by the judges of election to be recorded upon the minute-book of the bank, and shall notify the directors chosen of their election and for the time for them to meet at the banking-house for the organization of the new board. If at the time fixed for such meetings there should be no quorum in attendance the directors present may adjourn from time to time until a quorum shall be obtained.

3.

The directors elect shall meet for organization upon the notification given in accordance with law 2 within one week from the time of their election, but shall not do any business whatever prior to qualifying by taking the oath of office, as required by law.

4.

If the annual election for directors should not be held on the day fixed by the articles of association the directors in office shall order a special election, of which notice shall be given, judges appointed, and returns made and recorded upon the minute-book, and the directors chosen thereat shall be certified to the cashier and notified as provided by by-laws 1 and 2.

5.

The officers of the bank shall be a president, cashier, assistant cashier, and bookkeeper, and such other officers as may be required from time to time for the prompt and orderly transaction of its business, and all the officers, clerks, and agents shall be elected, appointed, or employed by the board of directors, or with the consent thereof, and their several duties may be prescribed by the board.

6.

The president shall hold his office for the current year for which the board of which he shall be a member was elected, unless he shall resign, become disqualified, or be removed, and any vacancies occurring in the office of the president or in the board of directors shall be filled by the remaining members.

7.

The cashier and the subordinate officers and clerks shall be appointed to hold their offices, respectively, during the pleasure of the board of directors.

8.

The cashier of this bank shall be responsible for all the moneys, funds, and valuables of the bank, and shall give bond, with security to be approved by the board, in the penal sum of twenty-five thousand dollars (\$25,000), conditioned for the faithful and honest discharge of his duties as such cashier, and that he will faithfully apply and account for all of such moneys, funds, and valuables, and deliver the same to the order of the board of directors

of this bank or to the person or persons authorized to receive them. The assistant cashier shall assume all the duties and responsibilities of the cashier in his absence, and shall give bond in the sum of twenty-five thousand dollars (\$25,000.00) for the faithful discharge of such duties.

9.

The president of this bank shall be responsible for all such sums of money and property of every kind as may be intrusted to his care or placed in his hands by the board of directors or by the cashier, or otherwise come into his hands as president, and shall give bond, with security to be approved by the board, in the penal sum of ----- dollars, conditioned for the faithful discharge of his duties as such president, and that he will faithfully and honestly apply and account for all sums of money and other property of this bank that may come into his hands as such president, and pay over and deliver the same to the order of the directors or to any other person or persons authorized by the board to receive the same.

10.

The bonds of the officers shall be placed in the custody of the stockholders of this bank to be designated by the board of directors, who shall not be one of the bonded officers, to be surrendered by him only upon the order of the board.

11.

The impression made below is an impression of the seal adopted by the board of directors of this bank.

[Seal]

12.

All transfers and conveyances of real estate shall be made by the bank under the seal thereof, in accordance with the orders of the board of directors, and shall be signed by the president or cashier.

13.

Whenever an increase of stock shall be determined upon in accordance with the articles of association of this bank it shall be the duty of the board of directors to cause all the stockholders to be notified thereof and a subscription to be opened thereof specifying the terms of payment agreed upon by the subscribers. Each stockholder shall be entitled to subscribe to shares of the new stock in proportion to the number of shares he already owns, but if any stockholder shall fail to subscribe to such new stock as he may be entitled to or to pay his subscription according to agreement, the board of directors shall determine what disposition shall be made of the privilege of subscribing for the new stock not taken.

14.

This bank shall be open for business from nine o'clock A. M. to three o'clock P. M. each day except Sunday and days recognized by the laws of this territory as holidays.

15.

The board of directors of this bank shall hold regular meetings at the banking-house for the transaction of business on the first Monday of each month, and should that day in any year fall upon a holiday, the regular meeting for that month shall be held on such other day as the directors of the preceding meeting shall order.

16.

The board may also hold special meetings upon the call of the president, cashier, or any three or more members, and whenever there shall not be a quorum at a regular or special meeting the members present may adjourn the meeting from day to day until a quorum shall be obtained, and any meeting may be adjourned from time to time by a vote of a majority of a quorum present, but no business except adjournment shall be transacted in the absence of a quorum.

17.

There shall be a committee to be known as the discount committee, consisting of the president, one director, and cashier, who shall have power to discount and purchase bills, notes, and other evidence of debt and to buy and sell bills of exchange, and any one of the said committee objecting to the discount or purchase of any paper shall be a refusal of said paper. Two of said committee shall be a quorum for discount.

17.

The board of directors may appoint one of its members or an officer of the bank to act as clerk at its meetings.

18.

The earnings of this bank shall be disposed of according to orders of the board of directors made at regular or special meetings, and no dividends shall be paid to stockholders or other disposition of earnings made except upon an order of the board.

19.

The organization papers of this bank, as executed and filed with the comptroller of the currency, the returns of judges of the election and proceedings at all regular and special meetings of the board of directors, the by-laws and all changes and all amendments thereof, and the report of all examining committees or directors made according to law 26, shall be recorded in the minute-book, and the minutes of each meeting of the board shall be signed by the president and attested by the cashier.

20.

The board of directors shall have power to prescribe and, when expedient, to change the form of books and accounts to be used in the transaction of the business of this bank and to prescribe in general or particular the manner in which its affairs shall be conducted.

21.

The stock of this bank shall be assignable and transferable only on the books of this bank, subject to the restriction and provisions of the banking laws, and transfer book shall be provided, in which all assignments and transfers of stock shall be made. No transfer of stock shall be made without the consent of the board of directors by any stockholder who shall be liable, either as a principal debtor or otherwise.

22.

Transfers of stock shall not be suspended preparatory to the declaration of dividends, and, unless an agreement to the contrary shall be expressed in the assignments,

dividends shall be paid to the stockholders in whose names the stock stands at the date of the declaration of dividends.

23.

Certificates of stock, signed by the president and cashier, shall be issued to stockholders, and the certificates shall state upon the face thereof that the stock is transferable only on the books of the bank.

24.

All the current expenses of this bank shall be paid by the cashier, who shall every six months or oftener, if required, make to the board of directors a statement thereof.

25.

All contracts, checks, drafts, etc., for this bank and all receipts for circulating notes received from the controller of the currency shall be signed by the president or cashier.

26.

There shall be appointed by the board of directors every six months a committee of three members thereof, whose duty it shall be to examine into the affairs of this bank, to count its cash and compare its assets and liabilities with the accounts of the general ledger, ascertain whether these accounts and all others are correctly kept, whether the condition of the bank corresponds therewith, and whether the bank is in a sound and solvent condition, and to recommend to the board such changes in the manner of doing business, etc., as shall seem to be desirable, the result of which examination

shall be reported to the board at the next regular meeting thereafter.

27.

The vice-president shall, in the absence of the president, assume all the duties and responsibilities of the president.

28.

A majority of the directors shall be a quorum to do business.

29.

A copy of the by-laws of this bank, as in force, shall be kept in a convenient place in the bank, to which any stockholder shall have free access during the regular hours of business.

30.

These by-laws may be changed or amended by a vote of two-thirds of the directors.

Butte City, Montana, Jan'y 14th, 1890.

Pursuant to the following notice, published in the "Daily Inter-Mountain," the stockholders of the First National Bank of Butte met in the parlor of said bank this day at three thirty P. M. for the purpose of electing directors to serve the ensuing year.

Annual Meeting.

The regular meeting of the stockholders of the First National Bank of Butte will be held at the office of said

bank on Tuesday, January 14th, 1890, between the hours of ten A. M. and four P. M.

Dated Butte City, December, 9th, 1889.

ANDREW J. DAVIS, Jr.,
Cashier.

Present: Andrew J. Davis, by proxy to J. E. Davis, Hiram Knowles, and A. J. Davis, Jr.

On motion, Hiram Knowles was chosen chairman and Andrew J. Davis, Jr., secretary.

On motion, duly carried, it was resolved to proceed to the election of directors, and Hiram Knowles and John E. Davis were chosen judges of the election, who announced the following directors duly elected, receiving nine hundred and seventy votes each: Andrew J. Davis, Hiram Knowles, S. T. Hauser, W. W. Dixon, James A. Talbott, A. J. Davis, Jr.

The meeting then adjourned.

ANDREW J. DAVIS, Jr.,
Sec'y.

Attest:

HIRAM KNOWLES,
Chairman.

J. R. BOYCE, Jr., a witness on the part of plaintiff, testified as follows: I reside in Butte and have lived here for about fourteen years, and have been at the ranch off and on; call Butte my home, and am acquainted with C. W. Darnold, and have known him since 1868 or '70.

Q. Did you have any conversation with him in the presence of Mr. Wellcome, in Butte City, with reference to what he knew in regard to the statements of Andrew

J. Davis, deceased, about disposing of the stock of bank stock know as the First National Bank of Butte?

A. I was present at a conversation that occurred in the office some time in December, I think it was about 1893.

That is — near as I can come to dates. I was residing at the ranch at the time, and Mr. Darnold was in the office with my father. They were checking up the books in the office of Mr. Wellcome during that month. It was prior to Christmas. I don't remember the exact dates, but it was possibly between the 16th and 25th. I was in there several times while they were checking. The conversation was in the presence of Mr. Wellcome, in this city, in his office.

Q. State what was said to you and Mr. Wellcome — reference to what he knew and expected to testify as a — in this case.

A. Well, he said that he had heard Judge Davis. That was along in the year 1887. He heard Judge Davis say that he intended the bank for Andy.

Q. Did he say anything about being subpoenaed or expecting to give his testimony in this case on the part of the defendants?

A. I think not at that time.

Q. Did he at any time? A. Recently he has.

Q. How recently?

A. Well, it was only in the last two weeks, I guess.

Q. Did you talk with him within the last two weeks about what he knew about this case? A. Yes, sir.

Q. State to the Court what occurred.

A. Well, he said that he would testify and he would be the last witness to testify in this case.

Mr. DIXON.—We object to this; it is not what this witness was produced for. Mr. Darnold was asked about this before.

— I will ask you this question, Mr. Boyce: You say you had a conversation with him in this city within the last two weeks with reference to what he expected to testify in this case? A. Yes, sir.

Q. Did he say to you in that conversation substantially that all he knew about this case was what Judge Davis had told him in 1887?

A. That was all he ever stated to me, what he had formerly stated, and that was what had occurred in 1887.

Q. Did he say to you that was all he knew about the case?

A. Well, he didn't state to me what he was going to testify to at all. That was all he gave me to understand he knew about the case.

By the COURT.—You were asked to state his statements to you, not what you understood.

(By the WITNESS.)

A. Well, he said he would be called as a witness, but he did not state, of course, what he would testify to.

(Mr. TOOLE.)

Q. He said he would be called upon to testify?

A. Yes, sir.

Q. Did he say to you what his testimony would be?

A. Not at that time. A. Nor did he say what his

testimony would be, because he did not know he was going to testify until this conversation.

Q. Did he tell you what he knew about this case?

A. He did.

Q. Did he tell you what he did know?

A. That he heard the Judge say that he intended giving the bank to Andy.

Q. When did he say this occurred?

A. That was in 1887.

Q. Mr. Boyce, I will get you to state to the Court how long Mr. Darnold remained in the employ of J. R. Boyce, Jr., as shown by your books and of your own knowledge.

A. He entered our employ in July, 1887, and continued in our employ until the 1st of March, 1890, or about the 1st of March, 1890.

Q. For whom was he employed during the 1st of Feb., 1890?

A. He was in the employ of J. R. Boyce, Jr., & Company, according to his entries on the books?

Q. How, according to your knowledge, then?

A. Well, according to my memory, he was there.

Q. Up to what time?

A. Until the 1st of March, 1890.

Cross-Examination.

(By Mr. FORBIS.)

I was present here during Mr. Darnold's testimony and heard it all, and knew what he testified at that time. I heard all the conversation excepting a very small part of it. I was talking to Col. Sanders during a short in-

terval, but I heard it in the main. I heard Mr. Darnold testify about what Judge Davis told him after his return from Tacoma. I was here during the whole of the trial. I was not subpoenaed as a witness. No subpoena was served on me. I was not present at the request of anyone, but just listening. Mr. Darnold told me that he had a conversation with the Judge in 1887. He never told me that he didn't have any other conversation with him relative to this matter. He simply told me of that conversation. He did not tell me that he was going to testify to anything else except that conversation. When he told me two weeks ago that he was going to testify as to the Judge's intentions I testified to that. He never told me that that was all he was going to testify to. He did not say whether he knew anything else or not. Mr. Darnold left my employ about March 1st, 1890. I recall it from the books. He made all the entries upon the books. He never made but few entries after the 1st of February, and during the entire month, I believe, his entries are not in the books.

Q. There are some entries?

A. No. I think they are all his entries through the month of February and up till about the 7th of March.

Q. Have you the books with you?

A. No, sir. I have them at my house in town.

Q. Did Darnold make any entries in those books after he was discharged?

A. I think not. I am not sure.

Q. Isn't it a fact that Mr. Darnold did come in occasionally and make entries there after he was discharged?

A. Well, I couldn't say for a fact with regard to that, he may have been consulted by the ass't bookkeeper in regard to some matters; but the books would show.

The books that were kept by Darnold were the books of J. R. Boyce & Co.—cash and day book, cash book, journal, day book, and ledger. I don't think I notified Darnold on the 1st of February that he was to be discharged. His discharge was very sudden. I don't think that he knew he was going to be discharged. I didn't think that he was going to be discharged myself.

Redirect Examination.

(By Mr. TOOLE.)

Q. Who took Mr. Darnold's place when he was discharged? A. Mrs. Johnson.

Q. In whose handwriting, then, do the books appear to have been made from the time that she took the place of Mr. Darnold?

A. In her handwriting. There might be possibly an entry where he—I don't think that he made any himself, but he may have dictated to her and assisted her a little. I think he did assist her a little, but probably didn't make an entry.

He has been going through our books recently; not an entry has been made in them. He has just been examining them.

The foregoing comprises all of the testimony on the trial of said cause.

[Title of Court and Cause.]

BILL OF EXCEPTIONS.

Be it remembered that on the 23d day of May, 1894, plaintiff in the above-entitled cause made his request in writing that the Court make certain findings of fact and conclusions of law, separately and severally; which requests were in words and figures as follows, to wit:

Now comes the plaintiff and requests the Court to make the following findings, or findings upon the following matters, viz.:

1. Was there any written assignment of said stock or certificates of stock or power of attorney executed by the donor in connection with the alleged gift?

2. Was there any written authority executed by the donor of any kind empowering the defendant Andrew J. Davis, or any other person for him, to *perform* said stock certificates of stock upon the books of the bank during the lifetime of the donor?

3. Was there any transfer, with or without such authority, of said stock or certificates thereof to the defendant Andrew J. Davis upon the books of said bank during the lifetime of the donor?

4. Did anything represent the donor as a proxy at any meeting in question after the alleged gift and prior to his death?

5. Did the donor act as a stockholder of said bank after the alleged gift?

6. Was the donor elected as president of said bank at a meeting of the stockholders thereof after said alleged

gift, and did he hold said office up to the time of his de-
-cease?

7. Was there any gift from the donor to the defendant Andrew J. Davis made or attempted to be made other than that alleged to have been made on the 27th or 28th of December, 1889, or at any times specified in the testimony of the witness James A. Talbott?

8. Was the donor contemplating making a trip or a journey at the time the alleged gift was made?

9. Was this a condition attached by the donor to said gift at the time of making the gift, that is to say: "If I don't come back or anything happens, I want you to have that stock"?

10. Was said gift to take effect prior to the death of said donor?

11. What was the exact language of the donor in making or attempting to make said alleged gift?

12. If any valid gift *mortis causa* was made, when was it made?

13. If the alleged donee exercised any dominion or control over said stock, did he do so with the knowledge or consent of the alleged donor other than such as is to be inferred from the alleged gift made in the 27th day or 28th day of December, 1889?

14. If he did exercise any such dominion or control, in what way did he do so?

15. Was any possession of said stock delivered to said donee other than that conferred by the alleged gift on the 27th or 28th day of December?

16. If any other possession was given him, in what was it given?

And as matter of law plaintiff requests the Court to find:

1. That said alleged done did not become a shareholder by said alleged gift under the statutes of the United States and by-laws of the bank made in pursuance hereof.

2. That said alleged donee did not succeed to the rights or liabilities of the deceased under said statutes and by-laws.

3. That said donor was not divested of his possession, dominion, and control of said stock under said statutes and by-laws or otherwise.

4. That the alleged gift, being made upon a condition precedent, was inoperative and cannot be aided by a court of equity so as to make it effectual.

5. That the title, control, and dominion over said stock not vesting immediately, but upon a future contingency, by its express terms, was invalid as a gift mortis causa.

6. That the legal title and control and dominion over said stock remaining in the alleged donor at the time of his death, the same vested in the plaintiff as administrator, under the statutes of the United States, who now holds and possesses the same.

7. That said defendant, Andrew J. Davis, is not entitled to have an assignment and power of attorney from the said plaintiff as such administrator authorizing a transfer of said stock upon the books of the bank, nor is he entitled to such transfers of said stock.

8. That under the common law of England, as adopted by the State of Montana, no valid causa mortis was made of said stock.

Filed May 23d, 1894.

And the said plaintiff also filed his motion for decree herein, which — in words and figures as follows, to wit:

[Title of Court and Cause.]

Now comes the plaintiff in the above-entitled action and moves the Court for judgment and decree in his favor upon the evidence introduced herein, and that said Andrew J. Davis, Jr., take nothing by his said answer and cross-complaint, and that the said decree direct the said bank to transfer the stock involved in this controversy to said plaintiff, in pursuance of the prayer of his complaint, for the following reasons, to wit:

1.

Because the evidence in said cause will not authorize a decree requiring an assignment of said certificates or a transfer of said stock to defendant Davis.

2.

Because, if the same is insufficient otherwise to authorize a transfer of said certificates of stock or to make said defendant, Davis, a shareholder in said bank, it is utterly insufficient under the statutes of the United States applicable thereto.

3.

Because — the laws of the United States applicable thereto said defendant, Davis, has neither the legal title or beneficial interest in the shares of stock of said defendant, First National Bank of Butte, and because the plaintiff herein claimed the right thereto under said statutes.

4.

Because the rights of the plaintiff and defendant Andrew J. Davis, as well as to dates and obligations of defendant bank, arise under the laws of the United States.

5.

Because the manner of becoming and rights and liabilities of shareholders are involved, which are created by and arise under the laws of the United States and must be determined by the interpretation thereof.

W. F. SANDERS,
McCONNELL, CLAYBERG & GUNN, and
TOOLE & WALLACE,

Attorneys for Plaintiff.

Filed May 23d, 1894.

And thereafter, on the 24th day of May, 1894, said cause was argued and submitted to the Court, and on the 26th day of May, 1894, the Court refused to and did not make the findings of fact or conclusions of law as requested by plaintiff and to which action of the Court in so doing, as to each of said requests separately and severally and as a whole, the plaintiff then and there and at the time duly excepted in open court.

And the Court on the last day aforesaid, overruled plaintiff's motion for judgment; to which plaintiff then and there and at the time, in open court, duly excepted.

And on the said 25th day of May, 1894, said Court made the following findings of fact and conclusions of law, to wit:

[Title of Court and Cause.]

In this action a trial by jury having been heretofore waived by oral consent of parties, by their attorneys, in open court, entered upon the minutes, the action is tried by the Court, and the Court having heard the evidence and argument of counsel and having considered the case and being fully advised in the premises, finds the following facts and conclusions of law, to wit:

Findings of Fact.

I.

In the latter part of December, 1889, Andrew J. Davis, now deceased, was and had been for some months seriously and dangerously ill and suffering from the disease and ailment from which he afterwards died..

II.

That on or about the 27th of 28th day of December, 1889, at Butte City, in the county of Silver Bow and State of Montana, the said Andrew J. Davis, now deceased, being then seriously and dangerously ill and suffering from the disease and ailment of which he afterwards died and in view and in apprehension and expectation of his death from said disease and ailment, gave to Andrew J. Davis, one of the defendants herein, as a gift, the shares of stock and certificates thereof of The First National Bank of Butte, one of the defendants herein, which are described in the complaint, and at the same time delivered said certificates of stock to the said Andrew J. Davis, one of the defendants herein, as a gift. The said defendant, An-

drew J. Davis, then and there received and accepted the same.

III.

That thereafter, on the 11th day of March, 1890, at Butte City, Montana, the said Andrew J. Davis died from the same disease and ailment from which he was suffering at the time he made the gift and delivery of the said stock and certificates thereof to Andrew J. Davis, one of the defendants herein and as above found.

IV.

That said Andrew J. Davis, one of the defendants herein, has ever since said gift and delivery above found, retained and held in his possession and claimed as his own, and does now so hold in his possession and claim as his own, all of the said shares of stock and the certificates thereof described in the complaint.

V.

That at the time of the gift and delivery of the said shares of stock and certificates thereof by the said Andrew J. Davis, now deceased, to the said Andrew J. Davis, one of the defendants herein, as above found, the said Andrew J. Davis, now deceased, was of sound and disposing mind.

VI.

That at and long prior to the time of the gift and delivery of said said stock and certificates thereof, as above found, the said Andrew J. Davis, now deceased, had and expressed a great affection for and a great confidence in the business capacity and character of the said Andrew J. Davis, one of the defendants herein.

VII.

That at the time of the gift of the stock and certificates thereof, as above found, it was and for several years prior thereto had been the intention of the said Andrew J. Davis, now deceased, to give the said stock and the certificates thereof of the said First National Bank of Butte to the said Andrew J. Davis, one of the defendants herein.

VIII.

The Court further finds as facts:

That there was no written assignment of said stock or certificates of stock or power of attorney executed by the donor in connection with the gift; that there was no written authority executed by the donor of any kind empowering the defendant, Andrew J. Davis, or any other person for him to transfer said stocks or certificates of stock upon the books of the bank during the lifetime of the donor, and that there was no transfer of the stock or the certificates thereof to the defendant, Andrew J. Davis, upon the books of the bank during the lifetime of the donor or ever or at all.

That at a meeting of the stockholders of the said bank held some time after the said gift had been made, and before the death of the donor, John E. Davis, a brother of the defendant Andrew J. Davis was given a proxy in writing by said defendant, which had been signed by the donor, before the date when the gift was made and delivered to defendant Andrew J. Davis before said gift was made; that said John E. Davis, under and by the directions and according to the request of said defendant, An-

drew J. Davis, voted said proxy at said stockholders' meeting; that said John E. Davis had no conversation with the said donor regarding said proxy, and after having voted the same returned it to the defendant Andrew J. Davis, who has ever since retained it.

That the donor was seriously and dangerously ill from a time prior to the date when he made the gift until his death, and did not revoke said gift or exercise any control over said stock or the certificates thereof, nor act as a stockholder of said bank.

That the donor was elected president of said bank after he had made said gift and he continued in that position until his death, but said election was without his knowledge or request, and he had no knowledge of said election of himself as president, or of his holding said position, and never did any act as president of the said bank from the time he made the gift.

That there was no gift made or attempted to be made by the donor to the defendant Andrew J. Davis other than the gift made about the 27th or 28th of December, 1889, as heretofore found in findings II.

That at the time the donor made the gift he was seriously and dangerously ill, suffering from the ailment and sickness of which he afterwards died, and was contemplating a trip or journey at the time.

That the gift by the donor to the defendant Andrew J. Davis was an absolute gift and was and is a valid gift, *mortis causa*, and the donee has ever since held possession and exercised control and dominion over said stock with the knowledge of the donor arising and resulting only from the fact of the gift and the donee's possession.

Conclusions of Law.

I.

That the defendant Andrew J. Davis is the owner of the stock and shares and certificates thereof of the First National Bank of Butte, which are described in the complaint herein, and is entitled to have said shares and stock transferred to him on the books of said bank, and to have new certificates issued to him therefor, and that said donor was divested of his possession, dominion, and control of said shares of stock by said gift.

II.

That the plaintiff herein, as special administrator of the estate of Andrew J. Davis, deceased, or otherwise, has not, *not* has said estate, any right, title, or claim in or to the shares of stock and the certificates thereof described in the complaint or any part thereof.

III.

That the defendant Andrew J. Davis is entitled to a decree herein in accordance with the prayer of this answer, and such decree is hereby ordered entered.

JOHN J. McHATTON,

Judge.

Filed May —, 1894.

To which said findings, separately and severally and as a whole, plaintiff then and there, at the time and in open court, duly excepted.

And on the day last aforesaid, upon motion of defendant, Andrew J. Davis, the court rendered and passed the following decree:

[Title of Court and Cause.]

In this action a trial by jury having been heretofore waived by oral consent of parties by their attorneys, in open court, entered upon the minutes, the action was tried by the court; and the court having heard the evidence and argument of counsel, having heretofore taken the case under advisement, and being now fully advised in the premises and all things being duly considered—

Now, on this 25th day of May, A. D. 1894, in open court, the court makes its findings of fact and conclusions of law in the case, which are herein signed and filed and which are in the words and figures following, to wit:

Findings of Fact.

I.

“That in the latter part of December, 1889, Andrew J. Davis, now deceased, was and had been for some months seriously and dangerously ill and suffering from the disease and ailment of which he afterwards died.”

II.

“That on or about the 27th or 28th of December, 1889, at Butte City, in the county of Silver Bow and State of Montana, the said Andrew J. Davis, now deceased, being then seriously and dangerously ill and suffering from the disease and ailment of which he afterwards died, and in view and in apprehension and expectation of his death from said disease and ailment, gave to Andrew J. Davis, one of the defendants herein, as a gift, the shares and stock and certificates thereof of The First National Bank of Butte,

one of the defendants herein, which are described in the complaint, and at the same time delivered said certificates of stock to the said Andrew J. Davis, one of the defendants herein, as a gift. The said defendant, Andrew J. Davis, then and there received and accepted the same."

III.

"That thereafter, on the 11th day of March, 1890, at Butte City, Montana, the said Andrew J. Davis died from the same disease and ailment from which he was suffering at the time he made the gift and delivery of the said stock and certificates thereof to Andrew J. Davis, one of the defendants herein, as above found."

IV.

"That the said Andrew J. Davis, one of the defendants herein, has ever since said gift and delivery above found retained and held in his possession and claimed as his own and does now so hold in his possession and claim as his own all of the said shares of stock and the certificates thereof described in the complaint."

V.

"That at the time of the gift and delivery of said shares and certificates thereof by the said Andrew J. Davis, now deceased, to the said Andrew J. Davis, one of the defendants herein, as above found, the said Andrew J. Davis, now deceased, was of sound and disposing mind."

VI.

"That at and long prior to the time of the gift and delivery of the said stock and certificates thereof, as above found, the said Andrew J. Davis, now deceased, had and

expressed a great affection for and a great confidence in the business capacity and character of the said Andrew J. Davis, one of the defendants herein.”

VII.

“That at the time of the gift of the stock and certificates thereof, as above found, it was and for several years prior thereto had been the intention of the said Andrew J. Davis, now deceased, to give the said stock and the certificates thereof of the First National Bank of Butte to the said Andrew J. Davis, one of the defendants herein.”

VIII.

“That there was no written assignment of said stock or certificates of stock or power of attorney executed by the donor in connection with the gift; that there was no written authority executed by the donor of any kind empowering the defendant Andrew J. Davis or to any other person for him to transfer said stock or certificates of stock upon the books of the bank during the lifetime of the donor, and that there was no transfer of the stock or the certificates thereof to the defendant Andrew J. Davis upon the books of the bank during the lifetime of the donor or ever or at all.

“That at a meeting of the stockholders of the said bank, held some time after said gift had been made and before the death of the donor, John E. Davis, a brother of the defendant, Andrew J. Davis, was given a proxy in writing by said defendant, which had been signed by the donor, before the date when the gift was made and delivered to said defendant, Andrew J. Davis, before said

gift was made; that said John E. Davis, under and by the directions and according to the request of said defendant, Andrew J. Davis, voted said proxy at said stockholders' meeting; that said John E. Davis had no conversation with the said donor regarding said proxy, and after having voted the same returned it to the defendant Andrew J. Davis, who has ever since retained it.

“That the donor was seriously and dangerously ill from a time prior to the date when he made the gift until his death, and did not revoke said gift nor exercise any control over said stock or the certificates thereof, nor act as a stockholder of said bank; that the said donor was elected president of said bank after he had made said gift, and he continued in that position until his death, but said election was without his knowledge or request and he had no knowledge of said election of himself as president or of his holding said position and never did any act as president of said bank from the time he made the gift.

“That there was no gift made or attempted to be made by the donor to the defendant Andrew J. Davis other than the gift made about the 27th or 28th day of December, 1889, as heretofore found in finding II.

“That at the time the donor made said gift he was seriously and dangerously ill, suffering from the ailment and sickness of which he afterwards died and was contemplating making a trip or journey at the time.

“That the gift by the donor to the defendant Andrew J. Davis was an absolute gift and was and is a valid gift *mortis causa*, and the donee has ever since held possession and exercised control and dominion over said stock,

with the knowledge of the donor, arising and resulting only from the fact of the gift and the donee's possession."

Conclusions of Law.

I.

"That the defendant Andrew J. Davis is the owner of the stock and shares and certificates thereof of the said First National Bank of Butte, which are described in the complaint herein, and is entitled to have said shares and stock transferred to him on the books of said bank, and to have new certificates issued to him therefor, and that said donor was divested of his possession, dominion, and control of said shares of stock by said gift."

II.

"That the plaintiff herein, as special administrator of the estate of Andrew J. Davis, deceased, or otherwise, has not, nor has said estate any right, title, or claim in or to the shares of stock and the certificates thereof described in the complaint or any part thereof."

III.

"That the defendant Andrew J. Davis is entitled to a decree herein in accordance with the prayer of his answer, and such decree is hereby ordered entered."

And thereupon it is by the Court ordered, adjudged, and decreed, in open court, on this 25th day of May, A. D. 1894, that plaintiff take nothing by his complaint herein; that defendant Andrew J. Davis is the owner of each and all of the shares of said stock and of the certificates thereof of the said First National Bank of Butte, which are described in the complaint herein as follows, to wit:

Nine hundred and fifty (950) shares of the capital stock of The First National Bank of Butte, Montana, one of the defendants herein, consisting of and represented by certificate No. 10, for four hundred and eighty-one (481) shares; certificate No. 14, for three hundred and forty-three (343) shares; certificate No. 22, for one hundred and sixteen (116) shares, and certificate No. 25, for ten (10) shares; and said Andrew J. Davis, defendant herein, is entitled to have each and all of said shares transferred to him on the books of said bank; that plaintiff, as special administrator of said estate of Andrew J. Davis, deceased, or otherwise, has not, nor has said estate any right, title, or claim of said shares of stock or the certificates thereof or any part thereof; that the First National Bank of Butte, one of the defendants herein, having appeared and answered herein, stating that it is ready and willing to comply with any order that the Court may make herein, be, and is hereby, ordered to transfer upon the books of said bank to Andrew J. Davis, one of the defendants herein, all of the shares and stock above described and mentioned in the certificates above mentioned, and to issue to said Andrew J. Davis, defendant, new and proper certificates therefor; and it is further considered and adjudged by the Court that the said defendant, Andrew J. Davis, have and recover of plaintiff herein or of the estate of the said Andrew J. Davis, now deceased, his defendant's costs and disbursements herein taxed, forty-six and 40-100 (\$46.40) dollars.

Dated May 25th, 1894, and signed.

JOHN J. McHATTON,

Judge.

Be it remembered that on the 23d day of May, A. D. 1894, the plaintiff in the above-entitled action submitted to the Court his several requests for findings of facts; which several requests for findings of facts were separately and severally submitted to the Court; and also certain requests upon questions of law; a portion of which said findings of facts and questions of law were not found by the Court, and in which respect the said plaintiff, by his attorney, in open court, then and there duly excepted to each thereof separate and severally; and the Court thereupon found certain facts and conclusions of law and filed the same with the clerk; to each and every such findings of facts and conclusions of law the said plaintiff by his attorneys in open court, then and there duly excepted.

And the said plaintiff having also filed his motion for judgment and decree upon the evidence herein, the same, being considered by the Court, was overruled, and to each ruling the plaintiff then and there, in open court, duly excepted, and his bill of exceptions was signed, sealed, and made a part of the records herein.

Filed May 25th, 1894.

To which plaintiff then and there and at the time and in open court excepted, and this his bill of exceptions is here and now, in open court, duly signed and made a part of the records herein this 25th day of May, A. D. 1894.

JOHN J. McHATTON,

Judge.

[Title of Court, Title of Cause.]

And upon the rendition of said decree upon the motion of plaintiff it was ordered that plaintiff have thirty days from and after the filing of the notice of motion for a new trial to prepare, serve, and file his statement and affidavits for a new trial herein; which said order was made, by consent of parties, in open court on the 25th day of May, 1894.

[Title of Court and Cause.]

Now comes the plaintiff in the above-entitled cause, being the party aggrieved therein, and within ten days after notice of the findings and decisions of the Court and the filing thereof gives notice of his intention to apply and move for a new trial herein and designates the following grounds therefor, viz:

I.

Newly discovered evidence material for the plaintiff making the motion and application.

II.

Insufficiency of the evidence to justify the findings and decision of the Court, and that the same are against law.

III.

Errors of law occurring at the trial and excepted to by the party making the motion and application.

The said application and motion will be made upon a statement of the case to be served and filed within thirty days from the service and filing of this notice, in accord-

ance with the order of the Court in which this action is pending and heretofore made therein, and upon affidavits filed and served within the statutory time allowed therefor.

W. F. SANDERS,
McCONNELL, CLAYBERG & GUNN,
TOOLE & WALLACE,

Attorneys for Plaintiff.

Service of the within is hereby admitted and copy received this 4th day of June, 1894.

M. KIRKPATRICK,
FORBIS & FORBIS, and
W. W. DIXON,

Attorneys for Defendants.

Filed June 4th, 1894.

[Title of Court, Title of Cause.]

Whereas it has been heretofore stipulated and agreed between the parties hereto that the time for preparing affidavits and statement on motion for new trial be extended thirty days from and after the filing of notice of motion for new trial; and

Whereas an order of Court has been duly made extending said time accordingly, which expires on the fourth inst.; and

Whereas the defendants, the adverse parties, are willing and consent to a further extension of time for preparing, serving, and filing of said affidavits and statement on motion for new trial:

Now, therefore, it is hereby stipulated and agreed that said court or the judge thereof may make an order ex-

tending said time for the purposes aforesaid for the space of twenty days from and after the date hereof, and that the said defendants have twenty days from and after the filing and service of said affidavits and statement to file and serve counter-affidavits and amendments to said statement, the extensions aforesaid being conceded to be necessary and proper in the matter of said motion and application.

Dated this second day of July, A. D. 1894.

W. F. SANDERS,
McCONNELL, CLAYBERG & GUNN,
TOOLE & WALLACE,

Attorneys for Plaintiff.

M. KIRKPATRICK,
FORBIS & FORBIS, and
W. W. DIXON,

Attorneys for Defendants.

For good and sufficient cause shown, the time for preparing, serving, and filing affidavits and statement on motion for new trial on the part of the plaintiff is hereby extended for twenty days, and the time for filing counter-affidavits and amendments—said statement is also extended for twenty days after the filing and service of said affidavits upon said defendants or their attorneys, all of which is done by the consent of the parties hereto and in pursuance of the foregoing stipulation.

Given under by hand this second day of July, A. D. 1894.

JOHN J. McHATTON,
Judge of said Court.

And within the time allowed for that purpose, in pursuance of said stipulations and orders of court in that behalf and in accordance with his notice of motion therefor, plaintiff comes now and makes this his motion and application for a new trial, and as a part thereof specifies the particular grounds therefor as follows, to wit:

I.

Newly discovered evidence material for the plaintiff in making the motion and application, as will appear from the affidavits herein.

II.

Insufficiency of the evidence to justify the finding and decision of the Court, and that the same are against law in this, to wit:

a. The evidence fails to show that there was any written assignments of said certificates of stock.

b. It fails to show that there was any power of attorney or instrument in writing executed in connection with the alleged gift authorizing the transfer or assignment of said stock or the transfer thereof on the books of defendant bank.

c. It does not show that the legal title to said certificates of stock was ever transferred or assigned to the alleged donee thereof.

d. It does not show that said donee ever acquired the beneficial interest in said stock.

e. It does not show that said donee ever became a stockholder in said bank.

f. It does not show that said alleged gift was ever perfected or that said alleged said donee was ever subjected

to the liabilities or entitled to the dividends or benefits of said alleged gift by becoming a shareholder or stockholder in said bank or otherwise.

g. It does not show that said alleged gift was perfected so as to substitute said alleged donor to the rights of said alleged donee.

h. The evidence fails to show that said alleged donee acquired any legal or equitable title to said stock, or that a court of equity had jurisdiction to supply or perfect the right thus left imperfect by the alleged donor.

i. The evidence shows that said alleged donee acquired no rights as a shareholder or stockholder in said bank, and that he was not subjected to any liabilities on account thereof as provided by the acts of Congress in that behalf or by the by-laws of said bank.

j. It shows that said alleged donee retained possession, dominion, and control of the stock in said bank after the alleged gift and up to his death.

k. It shows that said alleged donee never acquired possession, dominion, or control of said stock during the lifetime of said deceased, and that he could not—so under the said laws of the United States or by the by-laws of said bank, made for the protection of the public and those dealing with said bank.

l. It shows that the possession, dominion, and control of the stock of said bank designated in said certificates was held and exercised by said alleged donee during his lifetime and after said alleged gift, and that he was represented by proxy in voting and controlling of the same.

m. It shows that the alleged donor acted as a stockholder or shareholder in said bank after the alleged gift during his lifetime.

n. It shows that said alleged gift was made contingent upon said alleged donor's return from his trip to Tacoma, and that he did return from said trip.

o. It shows that said gift was not a gift in presenti; that it was not perfected as such, but was made upon condition of the alleged donor's death.

p. It shows that the alleged gift was upon a condition precedent and was not a perfect gift subject to be defeated by conditions subsequent.

q. The evidence only shows an intention to make a gift, and that no pretended gift was made or attempted to be made except that claimed to have been made at the writing desk, at the alleged donee's residence, in the presence of plaintiff and the alleged donee and donor, on the 27th or 28th day of December, 1889, which failed to show any assignment of said stock or the certificates thereof, or any power of attorney authorizing the same, or any transfer or authority to transfer the same upon the books of the bank, and it expressly shows said alleged gift to be conditional, imperfect, and invalid, and that it was made, if made at all, according to the testimony of the only witness to said alleged gift, to depend upon an accident or something happening to him on his said trip to Tacoma or his failure to return, and that said alleged gift was on account thereof invalid.

r. Because the evidence shows without contradiction that the only gift claimed or sought to be proven was on the 27th or 28th day of December, 1889, and because the only witness testifying to said gift stated in his testimony that he was sure that in making the alleged gift the donor said at the time that it was to be the donee's if anything happened to him on his said trip.

s. That all evidence as to any gift made or intended to be made must and does refer to said pretended gift on the said 27th or 28th day of December, 1889, and does not and cannot extend or enlarge the effect thereof, which was and is incomplete as a gift *causa mortis*.

t. It shows that the alleged donee was elected as an officer of said bank after said alleged gift and was a stockholder and the only one authorized to possess and control said stock under the laws of the United States.

u. Because the evidence without any conflict therein refers to the alleged gift on the 27th or 28th day of December, 1889; that it was made in contemplation of a trip from Butte, Montana, to Tacoma, Washington, and was expressly and without consideration in these words: "If I don't come back or anything happens, I want you to have that stock," and does not constitute a gift at common law, in force in this State, and could not be such under the statutes of the United States applicable to the transfer of stock in national banks.

v. It does not show that said alleged gift was to take effect prior to the death of the alleged donor.

w. It does now show that said alleged donee exercised any possession, dominion, or control of said stock during the lifetime of the donee; that he ever received any dividends or benefits thereof or was authorized to receive any, or that under the alleged gift he was ever admitted or registered as a stockholder or a shareholder or entitled to be, or that he was ever subjected to any liabilities as a stockholder under the laws of the United States or otherwise, or that he ever voted said stock or controlled the voting thereof with the knowledge or consent of the alleged donors.

x. The by-laws in evidence show that there was no gift *causa mortis* of said stock.

y. The evidence shows only an intention to give and that no gift was perfected during the lifetime of the alleged donor, and fails to show that said alleged gift was in contemplation of death, proximate or otherwise, from any disease with which the alleged donor was then suffering, and that said alleged gift was testamentary in its character and was intended to be perfected by will thereafter to be drawn, and is therefore invalid.

z. The evidence upon which said alleged gift is based is not certain, definite, and unequivocal that any such gift was made, and is therefore insufficient in law.

III.

Errors in law occurring at the trial and excepted to by the plaintiff, that party making this motion and application, in this, to wit:

The court erred:

a. In admitting evidence of the estimate of the alleged donor of the business qualifications of the alleged donee.

b. In admitting evidence of the affection of the said donor for said donee.

c. In admitting evidence of the intention of the said donee to make said gift.

d. In admitting any evidence of the alleged gift except the words and transaction used and had at the time the same is alleged to have been made and the only gift claimed or sought to be proven.

e. In admitting evidence tending to show an intention on the part of the alleged donor to give upon his death

or any other condition or contingency to establish the alleged gift causa mortis.

f. In admitting the evidence of John E. Davis that the alleged donee directing him in casting the votes of the alleged donee as his proxy.

g. In overruling the objection of plaintiff to the interrogation calling for said evidence and in not striking out the same on his motion.

h. Overruling plaintiff's objection to the introduction in evidence of the inventory and supplemental inventory of the estate of the said alleged donor, and in admitting the same.

i. In not finding upon all of the special findings requested by plaintiff.

j. In not finding in each or any separately and severally of the special findings so requested.

k. By making the findings it did make in said cause.

l. In overruling plaintiff's motion for judgment and in rendering a decree for defendant Davis.

m. In directing a transfer of the said stock upon the books of the bank.

n. In directing the perfection by which the decree itself appears to be imperfected.

o. In trans-ending the powers of the court in making and perfecting a gift for the stock in question from the alleged donor to the alleged donee.

p. In that said decree is in violation of the laws of the United States and by-laws of the bank.

q. In that it divests the estate of a legal and beneficial title to said stock without any consideration therefor and upon a pretended gift causa mortis, which could only have been done and perfected by the donor.

r. The court has no jurisdiction by said decree under the laws of the United States to make said defendant, Davis, a shareholder in said bank.

s. No discretion under said laws is vested in said court to substitute said alleged *said* donee for said alleged donor or relieve said donor or his estate of the liability as such stockholder and substitute said alleged donee therefor.

t. The court erred in not entertaining or passing upon the Federal question involved, and in not pursuing the rules of the common law adopted by statute in this State requiring the assignment of said stock to be in.

u. The court erred in other matters in the particular specified in the foregoing statement and hereby incorporated in this specification of errors and hereby expressly referred to.

Service of the copy of the foregoing statement of motion for new trial this day received and accepted, in pursuance of a stipulation and order heretofore made and entered in said cause.

Dated July 19th, 1894.

M. KIRKPATRICK,
FORBIS & FORBIS,
W. W. DIXON,
Attorneys for Defendants.

We, the undersigned attorneys for the plaintiff and defendant in the above-entitled cause, hereby agree to the foregoing statement on motion for a new trial as amended to be correct and accept and receive the same accordingly.

W. F. SANDERS,
McCONNELL, CLAYBERG & GUNN,
TOOLE & WALLACE,

Attorneys for Plaintiff.

M. KIRKPATRICK,
W. W. DIXON,
FORBIS & FORBIS,
Attorneys for Defendants.

I hereby certify that the foregoing statement and record has been settled, and that the same is allowed, and I authorize and direct the filing thereof by the clerk of this court.

August 11th, 1894.

JOHN J. McHATTON,
Judge.

[Title of Court and Cause.]

State of Montana, }
County of Silver Bow. } ss.

James R. Boyce, Junior, being first duly sworn, on his oath does say that he is fifty years of age and a resident of Butte city, Silver Bow county, and State of Montana, and that he has resided there for fourteen (14) years last past; that he is well acquainted with one W. C. Darnold, who

was a witness in above-entitled action, on the trial thereof in May last, on the part of the defendant therein; that he had a conversation with W. C. Darnold about the 1st day of July, A. D. 1894; he, Darnold, had been absent from Butte city about three (3) weeks and returned on or about the 1st day of July, A. D. 1894, from a trip east; he, Darnold, said he had been to Piqua, Ohio, visiting his old home; he said he had a choice of going to California or going to Piqua, and that he had preferred to go to Piqua, which choice was given to him by Mr. Meyer Gansburger; that he said he could go where he pleased, he had his choice; he said he had been chaperoned over the country by Meyer Gansberger, and that he was glad to get back; he said he had demanded a return ticket before he left in order that he could get back here in the event that his testimony might be necessary in cases now pending in court with eastern creditors and J. R. Boyce, Jr., and Company; that he had demanded this return ticket and got it; he said that he testified on behalf of Andy Davis on the trial of the above cause, inasmuch as he believed it would be to his interest to do so from a pecuniary standpoint, and that it would not hurt me in my cases that would follow, as my action would be against the bank, and that he desired to strengthen the bank as much as possible, but that his testimony on the trial of the case was not true; that his conversation with Judge Davis was in August, 1886, wherein Andy had discharged him in August, 1886, and that he had gone to Judge Davis and reported to him that Andy had discharged him for opening a ledger at the end of the month, instead of opening it at the first of the month, as Andy wished him to, for

transferring accounts from one ledger to the other, and that the Judge had told him to go back to Andy and apologize, for some day he might be the owner of the bank and that this conversation occurred in August, 1886, instead of February, 1890. He stated that he never had a conversation with Judge Davis after that time on the subject of Andy becoming the owner of the bank, and that this conversation of February, 1890, which was given in his testimony in behalf of the supposed gift by Judge Davis, which he had testified to on the trial, was not true.

On July 6th, Darnold came to me and asked me to accompany him to the residence of John H. Curtis; that he has heard read the affidavit of John H. Curtis made the day in the above cause with reference to said conversation, and that the statement of said Curtis as to said conversation is correct, and in accordance with my memory of the same.

On the 11th day of July, A. D. 1894, Darnold asked me to go with him to see Mr. Stapleton; that he wanted to correct the testimony he had given upon the trial of this case. We went to Mr. Stapleton's room in the Butte hotel, where said Darnold made the following statement in substance in the presence of Mr. Stapleton:

He, Darnold, there stated that his former statements on the trial were not true and that he wanted to correct them; that he did not feel right over it; that his conscience had troubled him and that he wanted to correct the statement. He then stated that the only conversation he ever had with Judge Davis concerning Andy owning the bank was in August, 1886.

Affiant further says that on the day of the funeral of Judge Davis, Andrew J. Davis, Junior, had a conversa-

tion with him with reference to the bank stock and wanted to know what I knew about it. Shortly after this I met Mr. Talbott on the corner of Jackson and Galena streets, in front of his residence, and had a conversation with him in reference to Andrew and the bank stock, in which he stated in substance that Judge Davis had given Andy the stock upon condition that he did not return from Tacoma on the sound, and that he did not believe he could legally hold it for the reason that it was made upon condition that he, Judge Davis, did not return, and that Judge Davis did return, and for this reason he did not believe that Andy could hold it.

Affiant further says that he has given the dates of the conversation above referred to as near as he can, and, while he may not be correct as to dates, he is certain as—the facts detailed in this affidavit.

Affiant further says that he had, during the progress of the trial of this case, some controversy pending between James R. Boyce, Junior, and Company and the bank, and that he was trying to make a compromise of it, and that he did not detail to the attorneys the facts hereinbefore last stated for the reason that he was fearful that it might interfere with the compromise and of what he thought would result in a settlement of it, and that he has not communicated the same to the attorneys or to the plaintiff in the case until since the termination of the trial of the above-entitled cause.

And further affiant saith not.

JAMES R. BOYCE, Jr.

Subscribed and sworn to before me this — day of July, A. D. 1894.

FRANK E. CORBETT,
Notary Public in and for the County of Silver Bow and State of Montana,

Due and sufficient service of the foregoing affidavit acknowledged by copy this 21st day of July, A. D. 1894.

M. KIRKPATRICK,
FORBIS & FORBIS, and
W. W. DIXON,
Attorneys for Defendants.

Filed July 21st, 1894.

[Title of Court, Title of Cause.]

State of Montana, }
County of Silver Bow. } ss.

John H. Curtis, being first duly sworn, on his oath doth say that he is fifty-four years of age; that he is a resident of the city of Butte, county of Silver Bow and State of Montana, and that he has been a resident of Silver Bow county about fourteen (14) years, and has been a resident of the State of Montana for about twenty-eight (28) years.

That he heard a conversation between James R. Boyce, Junior, and W. C. Darnold, who was a witness in the case aforesaid on the trial thereof in the above-entitled court in the month of May, A. D. 1894, at my residence, in the city of Butte, county of Silver Bow and State of Montana, about the 10th day of July, A. D. 1894; that I heard Darnold make a statement in said conversation to Mr. Boyce which was in substance as follows, to wit: That he, Darnold, had made a demand upon Mr. Davis to give him

ten thousand dollars (\$10,000.00), which would enable him to go into business in his own town in Ohio, and that if they did not give it he intended to go—the attorneys and tell them that he misrepresented his statements on the witness stand. Mr. Boyce remarked, Darnold, you know that I warned you before the trial to confine yourself to the truth in this case, and Darnold remarked, Well, Mr. Boyce, I am trying to do the best I can for myself, and in doing that I want to aid you in getting your claim; and he, Darnold, turned around and asked me if that was not right. I answered him no; that Boyce's is a legitimate claim, which he can contest for in his own rights in a legal way, and your claim is an illegitimate claim, and the penitentiary would be your doom if it was found out that you lied in this testimony. That I have not communicated this conversation to the plaintiff or his counsel, or to anybody until now. I kept this to myself.

And affiant further saith not.

JOHN H. CURTIS.

Subscribed and sworn to before me this 21st day of July, A. D. 1894.

[Seal]

FRANK E. CORBETT,

Notary Public in and for the County of Silver Bow and State of Montana,

Due and sufficient service of the foregoing affidavit acknowledged by copy this 21st day of July, 1894.

M. KIRKPATRICK,

FORBIS & FORBIS, and

W. W. DIXON,

Attorneys for Defendants.

Filed July 21st, 1894.

[Title of Court and Cause.]

State of Minnesota, }
County of Douglas. } ss.

John B. Wellcome came personally before me and, being first duly sworn, on his oath doth say: I am acquainted with W. C. Darnold, a witness who testified in behalf of the defendant in the above-entitled action. Some time before the above-entitled action was commenced I had a conversation with the said Darnold at my office, in Butte, Montana, which conversation was had in the presence of James R. Boyce, Jr., and which conversation related to the knowledge possessed by W. C. Darnold of facts connected with the transfer of the stock of the First National Bank of Butte from Andrew J. Davis, deceased, to Andrew J. Davis, Jr. We were talking about a suit which Mr. Boyce proposed to bring against the First National Bank, when Mr. Darnold said that he considered it strange that he had not been called upon to testify in the Davis will case. As I, the affiant, am one of the attorneys for the contestant in the Davis will case, I inquired of Mr. Darnold as to what he would testify to should he be called upon. Mr. Darnold then explained that he knew nothing in regard to the will, but that his testimony would be valuable to Andrew J. Davis, Jr., in securing to Andrew J. Davis, Jr., the stock of the First National Bank. I then asked Mr. Darnold what he knew respecting the matter, and he said at one time he was employed in the First National Bank as bookkeeper; that this was some time prior to the death of Andrew J. Da-

vis, Sr.; that Andrew J. Davis, Jr., was employed in the bank at the same time; that he, Darnold, had had some difficulty or disagreement with Andrew J. Davis, Jr., and that thereupon he went to Andrew J. Davis, Jr., and told him that he did not wish to continue longer in the employ of the bank, as he could not get along with Andrew J. Davis, Jr.; that Andrew J. Davis, Sr., then said, "Mr. Darnold, you should not take exception to anything Andy says or does, as he will some time own this bank. In fact, he does own it now." I then asked Mr. Darnold when this conversation occurred. He said he could not give the exact date of it, but it was some time before the death of Andrew J. Davis, Sr., and some time before Andrew J. Davis, Sr., started for the Pacific Coast. I then asked Mr. Darnold if he had any conversation with Andrew J. Davis, Sr., in regard to Andy and the bank stock after the return of Andrew J. Davis, Sr., from the coast, and he replied that he had not. He said he left the bank immediately after having the conversation with Andrew J. Davis, Sr., as hereinbefore set forth, and that after that time he had no conversation whatever with Mr. Davis, the deceased. I then told Mr. Darnold that I did not think his testimony was material to either side, and he said he thought it might be used by Andy in establishing the fact that Andrew J. Davis, Sr., intended to give him (Andy) the bank. I could see from Mr. Darnold's manner and conversation that he thought that I (the affiant) was one of the attorneys for Andrew J. Davis, Jr. I

then told him I was retained for the contestant in the will case, and that my interest and the interests of my client were opposed to Andrew J. Davis, Jr. He then said that he thought I was the attorney for Andrew. Darnold made no mention whatever at that or any other time of any conversation had with Andrew J. Davis, Sr., after the return of the latter from the Pacific coast. In answer to the question as to whether any such conversation occurred he expressly stated that none had occurred, and that the conversation as given above was the only conversation he ever had with Andrew J. Davis, Sr., touching the question of Andrew's interest in the bank. As one of the attorneys for the Root interest in this controversy, I was particular in examining and questioning Mr. Darnold carefully as to what he knew touching the claim of Andrew J. Davis, Jr., to the stock of the First National Bank.

JOHN B. WELLCOME.

Subscribed and sworn to before me this 19th day of July, A. D. 1894.

[Notarial Seal]

GEO. L. TREAT,
Notary Public, Minnesota.

Filed July 24th, 1894.

[Title of Court and Cause.]

Defendant Andrew J. Davis moves the court to strike from the files and not to consider upon plaintiff's motion for a new trial herein the affidavit of John B. Wellcome,

herein purporting to be filed on the twenty-fourth day of July, A. D. 1894, for the reason that said affidavit was not filed or served within the time required by law or by stipulation of the parties and the order of the Court herein made on the second day of July, A. D. 1894.

M. KIRKPATRICK,
FORBIS & FORBIS, and
W. W. DIXON,
Attorneys for Defendants.

The plaintiff and his attorneys in the above-entitled action are hereby notified that defendant will bring on the above motion for hearing before the above-entitled court or the Judge thereof upon the settlement of the statement on motion for new trial herein, or upon the hearing of said motion for new trial, as said court or Judge may direct.

M. KIRKPATRICK,
FORBIS & FORBIS, and
W. W. DIXON,
Attorneys for Defendants.

Service of foregoing motion and notice by copy acknowledged this 31st day of July, A. D. 1894.

Rec'd copy foregoing this 31st day July, 1894.

McCONNELL, CLAYBERG & GUNN,
Attorneys for Plaintiff.

Filed August 1st, 1894.